SWINOMISH T
CWA 303 (c)

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APPLICATION FOR TREATMENT AS A STATE AS TO REGULATORY ADMINISTRATION OF THE CLEAN WATER ACT, SECTION 303(c), WATER QUALITY STANDARDS PROGRAM

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Swinomish Tribal Community

A Federally Recognized Indian Tribe Organized Pursuant to the 1934 I.R.A.

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June 14, 2006

L. Michael Bogert
Regional Administrator
EPA Region 10 (ORC-158)
1200 Sixth Avenue
Seattle, WA 98101

RE: Swinomish Tribe's Application for Treatment as a State under the Clean Water Act, Sections 303(c) and 401.

Dear L. Michael Bogert:

The Swinomish Indian Tribal Community presents its application for treatment as a state under Section 303(c), codified as 33 U.S.C. § 1313(c), and Section 401, codified as 33 U.S.C. § 1341, of the Clean Water Act for implementation of a Water Quality Standards Program.

Should any questions arise or if further information is needed, please contact Todd Mitchell, Water Resources Manager, at 360-466-7201 or tmitchell@swinomish.nsn.us. Thank you for your attention to this matter. We look forward to hearing from you.

Sincerely,

Ann E. Tweedy
Tribal Attorney

CC: Rich McAllister
Todd Mitchell

Enclosures (1)

APPLICATION FOR TREATMENT AS A STATE AS TO REGULATORY ADMINISTRATION OF THE CLEAN WATER ACT, SECTION 303(c), WATER QUALITY STANDARDS PROGRAM

I. INTRODUCTION

In 1989, the Swinomish Indian Tribal Community, ("Tribe" or "SITC"), applied for and received recognition as a "state" under Section 106 of the Federal Water Pollution Control Act, ("the Clean Water Act"), codified as 33 U.S.C. § 1256, for the development of water quality protection programs. In 2001, the Tribe applied for and received recognition as a "state" under Section 319(h) of the Clean Water Act, codified as 33 U.S.C. § 1329(h), for non-point source management programs. Additionally, in 2003, the Tribe also applied for and received recognition as a "state" under section 105 of the Clean Air Act, 42 USC § 7405. The Tribe now seeks recognition as a "state" under Section 303(c), codified as 33 U.S.C. § 1313(c), and Section 401, codified as 33 U.S.C. § 1341, in order to implement its new Clean Water Standards ("Standards").

Before the Environmental Protection Agency ("EPA") may approve a tribe's exercise of regulatory authority under the Clean Water Act, the Tribe must qualify for treatment as a state ("TAS"). Section 518(e) of the Clean Water Act, codified as 33 U.S.C. § 1377(e), establishes the threshold requirements that tribes must meet to be treated as a state.[1] These requirements are expanded upon and laid out in more detail in 40 C.F.R. section 131.8:

> (1) The Indian Tribe is recognized by the Secretary of the Interior and meets the definitions in Sec. 131.3 (k) and (l),
>
> (2) The Indian Tribe has a governing body carrying out substantial governmental duties and powers,
>
> (3) The water quality standards program to be administered by the Indian Tribe pertains to the management and protection of water resources which are within the borders of the Indian reservation and held by the Indian Tribe, within the borders of the Indian reservation and held by the United States in trust for Indians, within the borders of the Indian reservation and held by a member of the Indian Tribe if such property interest is subject to a trust restriction on alienation, or otherwise within the borders of the Indian reservation, and
>
> (4) The Indian Tribe is reasonably expected to be capable, in the Regional

[1] Section 1377(e) provides that the Administrator of the EPA may grant a tribe status as a state provided that the following threshold requirements are met:

> (1) the Indian tribe has a governing body carrying out substantial governmental duties and powers; (2) the functions to be exercised by the Indian tribe pertain to the management and protection of water resources which are held by an Indian tribe, held by the United States in trust for Indians, held by a member of an Indian tribe if such property interest is subject to a trust restriction on alienation, or otherwise within the borders of an Indian reservation; and (3) the Indian tribe is reasonably expected to be capable, in the Administrator's judgment, of carrying out the functions to be exercised in a manner consistent with the terms and purposes of this chapter and of all applicable regulations. 33 U.S.C. § 1377(e).

Administrator's judgment, of carrying out the functions of an effective water quality standards program in a manner consistent with the terms and purposes of the Act and applicable regulations.

Here, because the Tribe has already received TAS recognition under sections 106 and 319(h) of the Clean Water Act, it need only provide information in this application that was not previously submitted. 40 C.F.R. section 131.8(b)(6). Nonetheless, for ease of review, the Tribe provides below an in-depth showing that it meets these four requirements for delegation of Section 303(c) Water Quality Standards and Section 401 Water Quality Certification program administration. The successful previous applications are also attached for reference. Previous Applications, attached as Exhibit 1.

II. THE SWINOMISH TRIBE MEETS ALL APPLICATION REQUIREMENTS UNDER 40 C.F.R. SECTION 131.8.

1. The Swinomish Tribe Is Recognized by the Secretary of the Interior.

The Swinomish Indian Tribal Community is a federally recognized Indian Tribe, reorganized pursuant to Section 16 of the Indian Reorganization Act of 1934 (25 U.S.C. 476), and is presided over by its constitutionally-formed governing body, the Swinomish Indian Senate.

The Swinomish Indian Tribe of the Swinomish Reservation, Washington is recognized in the Federal Register, Volume 70, No. 226, Friday, November 25, 2005. Notices by the Department of the Interior, Bureau of Indian Affairs as one of the Indian entities recognized and eligible to receive services from the United States Bureau of Indian Affairs, Federal Register Notice, attached as Exhibit 2.

2. The Swinomish Tribe Carries Out Substantial Duties and Powers Over a Defined Area.

A) Form of Tribal Government.

By authority of the Constitution, as amended, of the Swinomish Indian Tribal Community, the Swinomish Indian Senate is the governing body of the Tribe as shown in Article III, Section 1, of the Swinomish Constitution. Swinomish Constitution, attached as Exhibit 3.

Originally adopted in 1935, the Constitution, as amended, includes:

1. Tribal name and legal territory
2. Tribal membership requirements;
3. Governing body membership, organization, and powers;
4. Bill of rights including voting, equal opportunity, freedom of expression, and legal due process;
5. Tribal land ownership and leasing; and
6. Constitution and By-Law amendment process.

Under the adopted Bylaws, a description of the Senate organization includes:

1. Duties of elected officers;
2. Senate membership qualifications;
3. Time of annual election, General Council meeting, and Senate meetings;
4. Quorum requirements; and
5. Procedural requirements for adoption of ordinances and resolutions.

Senate members are nominated for election by a petition signed by at least five Community members. Primary elections for those Senate seats that have expired are held in February of each year, and the run-offs are then held in March on the day of the General Council meeting. All tribal members who are twenty-one years of age or older and who have either resided, as defined by tribal ordinance, west of Interstate 5 in Skagit County or maintained regular contact with the Reservation, are members of the General Council and may vote for Senators. Upon election, the Senators serve for a five-year period. Senate officers are internally elected. The Senate may appoint committees, delegate powers and duties to them, and require them to report to the Senate. A report of the past year's accomplishments and upcoming year's plan are reported to the Council by the Senate. Annual Report with Senate Roster, attached as Exhibit 4.

B) <u>The Swinomish Tribal Senate Performs A Wide Variety of Governmental Functions.</u>

SITC carries out substantial governmental duties. Examples of the governmental functions the SITC performs include law enforcement functions, functions related to health, education, and welfare, and functions related to zoning and environmental protection. To carry out these functions, the SITC employs some one hundred individuals, including police offers, medical professionals, managers, scientists, and all the other personnel necessary to carry out the duties of a sovereign Indian nation.

SITC has a republican form of government. Power is vested in the General Council, which consists of all members of the SITC of voting age. The General Council meets once a year. During the rest of the year, the General Council delegates its authority to the Senate, which consists of members of the General Council who are elected by secret ballot.

In terms of law enforcement and social services, the SITC employs ten police officers, including the Chief. It also employs a probation officer and a number of social workers who provide services that are often court-ordered, such as alcohol and domestic violence counseling. The SITC has a contractual arrangement to utilize the Skagit County jail and the jail of the Nisqually Indian Tribe for incarceration of persons convicted of crimes. As detailed below, the Planning Department and Housing and Utility Authorities also exercise considerable civil enforcement functions.

In terms of health, education, and welfare, the SITC employs a doctor, a dentist, three nurse practitioners, and about a dozen associated employees. The SITC has a daycare

program and a "Birth-to-Six" program. It also works extensively with nearby schools to help meet the unique needs of tribal youth. The SITC runs a satellite branch of the Northwest Indian College and has established a program designed to help students earn their GEDs.

SITC maintains tribal housing for the majority of tribal members who live in the area. SITC also supplies drinking water and sewage disposal for tribal members and non-tribal members who live in the more densely populated locations on the Reservation. SITC provides various social services, in addition to the ones previously mentioned, including mental health and alcohol counseling.

The SITC administers a zoning code, issues building permits and inspects new construction, and otherwise performs the functions of a planning or building department.

The Fisheries Office and the Skagit River System Cooperative, which is a cooperative venture with another Indian tribe, employ nearly two dozen individuals, including biologists, managers, and administrative staff to manage the fishing and hunting resources of the SITC and to conduct scientific research and monitoring regarding fisheries and habitat restoration.

In terms of taxation and eminent domain, SITC levies taxes on several of the different economic activities subject to tribal jurisdiction. Those taxes are: Utility Business Activity Tax, Retail Food and Beverage Tax, Tobacco Tax, Tribal Employment Rights Office (TERO) Tax, and Fish Tax. SITC reserves the right to exercise its inherent power of eminent domain.

C) The Tribe's Power to Perform Governmental Functions Is Supported by its Constitution and the Treaty of Point Elliott.

1) Article VI, Section 1 of the Tribe's Constitution.

The enumerated powers of the Senate are found in Article VI, Section 1 of the Constitution and authorize the Senate to act on the Tribe's behalf. In that regard, the Senate is empowered, inter alia, to:

i. Negotiate with Federal, State and local governments;
ii. Impose taxes and license fees upon members of the Community and upon non-members doing business within the Reservation;
iii. Promulgate and enforce ordinances governing the conduct of all persons within the Reservation providing for the maintenance of law and order and the administration of justice by establishing a Tribal Court system;
iv. Safeguard and promote the peace, safety, and general welfare of the Reservation by regulating the conduct of trade and use and disposition of property within the Reservation;
v. Cultivate and preserve native culture and Indian ceremonials;
vi. Adopt resolutions regulating procedure of the Senate, and of other Tribal

agencies and Tribal officials; and

vii. Delegate to subordinate boards any of the enumerated powers reserving the right to review any action taken thereunder.

2) Other Constitutional Provisions.

Additional Senate authority is found under its Future, Reserved, and Additional Powers, Article VI, Sections 3, 4 and 5 respectively. These sections empower the Tribe to:

i. Exercise powers delegated by the Secretary of the Interior or authorized agency of the government;
ii. Exercise the rights and powers vested in the tribes or bands of the Swinomish Indian Reservation, but not referred to in the Constitution; and
iii. Regulate all land uses within the Reservation.

3) The Treaty of Point Elliott.

The Treaty with the Duwamish, Suquamish, Etc., 1855, 12 Stat. 927, ("Treaty") was signed January 27, 1855, ratified by the U.S. Congress on March 8, 1859, and proclaimed by the U. S. President April 11, 1859. *See* Treaty, attached as Exhibit 5. Now known as the "Treaty of Point Elliott," this Treaty set aside SITC's reservation for the Tribe's exclusive use and occupation. Treaty of Point Elliott, Art. 2. Additionally, the Treaty confirmed SITC's fishing, hunting, and gathering rights. Treaty of Point Elliott, Art. 5. Specifically, the Treaty affirms the "right of taking fish at usual and accustomed grounds and stations . . . together with the privilege of hunting and gathering roots and berries on open and unclaimed lands." *Id.*

3. The Swinomish Tribe Has Substantial Authority to Regulate Water Quality and Other Aspects of the Environment.

A) The Regulatory Boundaries of the Swinomish Reservation.

1) Narrative Description of Boundaries

The Swinomish Reservation consists of all the lands and waters within the exterior boundaries of the Reservation, which are shown in the map below. The reservation includes the Swinomish Channel at least through the midpoint and extends to the extreme low water mark of the south, west, and north sides of the reservation, which border waterways. *See State v. Edwards*, 188 Wash. 467, 470-72, 62 P.2d 1094 (1936).

These exterior boundaries of the reservation were established by the Treaty of Point Elliot. The treaty describes the Reservation as "the peninsula at the

southeastern end of Perry's Island, called Shais-quihl." *See* Exhibit 5. Today, "Perry's Island" is known as Fidalgo Island.

Isaac Stevens, the first territorial governor of Washington Territory, drew a map of the Reservation at the same time he negotiated the Treaty on behalf of the United States. That map and other contemporary maps and correspondence describe the Swinomish Indian Reservation as that part of Fidalgo Island east of a line running from Fidalgo Bay due south to Similk Bay. This boundary line corresponds to a marshy intertidal area that connected Fidalgo and Similk Bays at the time the treaty was signed. Early maps depict what is now McGlinn Island as a peninsula on Fidalgo Island, rather than a separate island.

Subsequently, in 1875, President Grant diminished the boundaries of the Reservation by Executive Order on September 9, 1873. *See* Executive Order, attached as Exhibit 6. The Executive Order moved the northern boundary of the Reservation east so as to exclude the peninsula of land now known as March's Point from within the exterior boundaries of the Reservation.

In the early 1900s, the Army Corps of Engineers straightened and dredged the Swinomish Channel, cutting off the two oxbows to the north and McGlinn Island to the South and transforming the Channel from a water body that went dry during low tide to one that was navigable throughout the tidal cycles. Recently, SITC purchased the property interests in McGlinn Island with funds from a federal appropriation.

The regulatory boundaries of the Reservation[2] extend from the historical midpoint of the Swinomish Channel,[3] to the extreme low water mark of the southern and western waters surrounding the Reservation, to a line that trends east from the head of Turners Bay, then heads north to Padilla Bay. *See* Regulatory Boundaries Map below, and attached in Exhibit 7.

Today, the northern regulatory boundary of the Reservation is the line established by the Executive Order. The other boundaries, comprised of the marine waters of Padilla Bay, the historical midpoint of the Swinomish Channel, Skagit Bay, Similk Bay, and Turner's Bay, were established by the Treaty, reaffirmed by the Executive Order, and subsequently recognized by the Washington State Supreme Court. *See State v. Edwards*, 188 Wash. 467, 62 P.2d 1094 (1936). These regulatory boundaries, which are accurately reflected in the map below , circumscribe the area over which the Tribe wishes to assert authority to implement Clean Water Standards under Section 303(c), codified as 33 U.S.C. § 1313(c), and Section 401, codified as 33 U.S.C. § 1341, of the Clean Water Act.

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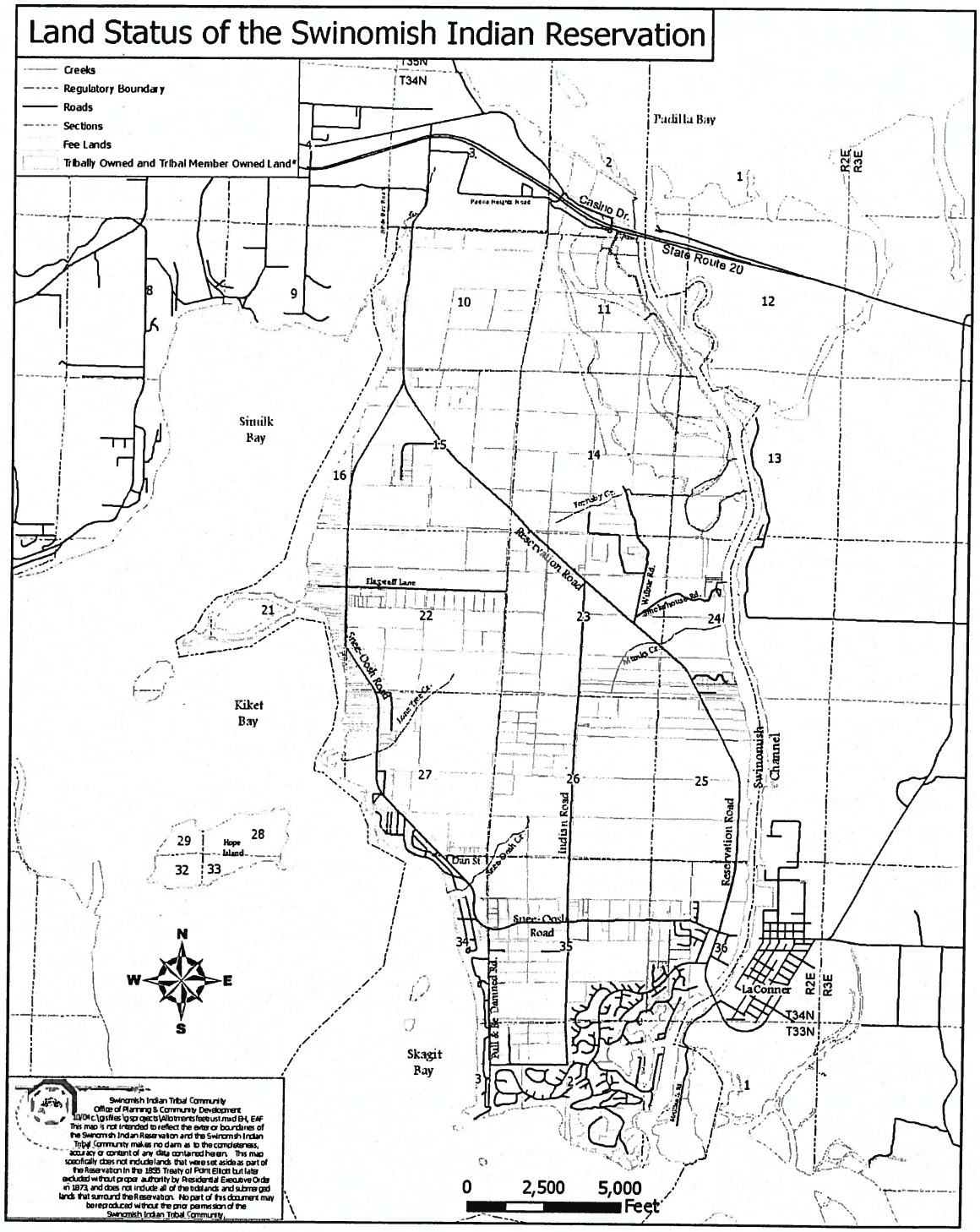
[2] The boundaries described in this section are for regulatory purposes only. The Tribe reserves the right to argue outside of the context of this Water Quality Standards TAS application that the actual reservation boundaries cover a greater area than those described herein.

[3] Although the Tribe believes the entire channel is included within the reservation boundaries, it is asserting regulatory authority, for TAS purposes, only to the historical midpoint of the Channel.

2) Map of Reservation Boundaries. (see below.)



* Tribal Trust Land, Individual Trust Land, and Tribal Fee Land

B) Legal Counsel's Statement Describing the Basis of the Tribe's Authority to Regulate Water Quality.

1) Introduction to Tribal Environmental Authority and Goals.

The Swinomish Tribal environmental authority, as evidenced by and through a variety of codes and ordinances, collectively encompasses: 1) land use zoning on all Reservation lands, 2) environmental assessment and performance standards for land use impacts, 3) adoption of air quality standards for the Reservation airshed, 4) management of Reservation ground water resources, and 5) permitting requirements for septic systems, waste disposal, solid waste sites, water and sewer systems, sport and crab fishing, biocide use, outdoor burning, industrial exhaust emissions, forestry, and development activities.

The long-range goals established for the protection of natural resources are:

i. To ensure an environment that is compatible with the purposes for which the Reservation was created.

ii. To promote the maximum fulfillment of traditional cultural and religious tribal values and the continuance of a heritage of balanced dependence of community members on the renewable resources of the Reservation.

iii. To preserve, enhance, rehabilitate and utilize the natural resources and ecological, recreational and aesthetic qualities of the Reservation; and to recognize an obligation to future generations in the comprehensive management of the natural resources.

iv. To further develop Tribal capability to administer and enforce protective and comprehensive management measures for Reservation resources. The Tribe will continue to balance environmental preservation and enhancement with the environmentally responsible development necessary to promote housing, employment, and economic activities.

2) Primary Tribal Ordinances through which the Tribal Government Exercises Its Environmental Authority.

Pursuant to the Tribe's constitutional authority and established environmental goals and policies, the Senate has adopted the following ordinances to provide a legal framework of the Tribe for protecting Tribal water resources. These are set forth below in chronological order, by Title:

Title 10. ***Public Health & Welfare***

1981 Health and Sanitation

Establishes domestic water and sewage disposal facility standards, food service regulations and sets other health and sanitation standards for activities within the Reservation and requires permits for certain categories of activities.

Title 11. ***Utilities.***

1989 Utility Authority
Creates the Utility authority to provide water and sewer services to reservation residents.

1989 Utility Commission
Creates five-member Utility Commission, composed of at least three reservation residents who receive utilities services and at least one tribal senator, to serve as the advisory and policy settling board for the Utility Authority.

1989 Reservation Utility Improvement Districts
Establishes the power of the Senate to create utility improvement districts within the boundaries of the reservation.

1989 Issuance of Bonds to Fund Utility Improvements
Authorizes the Tribe to issue bonds to fund utility improvement projects.

1989 Connection to Tribal Sewer System and Construction of Private Sewer Systems
Provides for mandatory connection to tribal sewer system within a specified area and for construction of a private septic system outside of that area. Establishes construction standards for private sewer systems and public health standards for disposal of waste.

1990 Reservation Sewer and Water Districts
Authorizes reservation sewer and water districts, specifically the acquisition, construction, maintenance, operation, development, reorganization, and regulation of water and sewer systems, including treatment and disposal plants and all necessary appurtenances and improvements thereto.

1992 Private Water Systems
Allows for construction of private water systems only outside of area served by tribal water system. Requires permit and inspection

for private water system and requires compliance with public health standards.

1992 Solid Waste Disposal
Defines illegal dumping and establishes standards for storage of solid waste on the reservation. Provides that the Utility Authority will enter a contract for trash collection in the reservation community.

Title 12. ***Building and Construction.***

2003 Storm-water Management
Establishes storm-water management planning and permitting requirements for specified types of new construction based on state standards.

2003 Ventilation and Indoor Air
Establishes ventilation system and indoor air quality requirements for new construction in order to protect respiratory health and improve air quality generally.

Titles 19-20. ***Environmental Protection, Land Use, and Zoning.***

1964 Planning Commission
Creates the Tribal Planning Commission, and initiates the processes of comprehensive planning. The Planning Commission reviews proposed development actions for consistency with land use and environmental regulations.

1977 Tribal Environmental Policy Act (TEPA)
Requires environmental review of actions to assess potential impacts to the Reservation environment, and sets out an environmental impact checklist, and a scoping and assessment procedure.

1977 Zoning
Delineates land use area designations and allowable uses. It also describes the land use development permit process.

1986 Coastal Zone Management Plan
In concert with the Comprehensive Land Use Plan, establishes goals, policies, performance standards, and permitting procedure for any land use activities within the Reservation boundaries, with special emphasis on impacts to shoreline and marine resources.

1992 Herbicides and Pesticides.
Requires a permit for any application of herbicides and pesticides

within the reservation, except for minor household use conducted in accordance with manufacturer directions.

2003 Clean Air Act
Adopts the Northwest Air Pollution Authority (NWAPA) regulations by reference for implementation of air quality standards for the Reservation airshed under the Clean Air Act.

Collectively, the Tribal Code and Tribal organizations establish environmental programs and regulations to protect Reservation resources. The ordinances and resolutions embodied in the Tribal Code and enacted pursuant to the Constitution, safeguard the health, safety, and welfare of the Reservation community from serious and substantial environmental resource degradation.

Tribal officials or bodies granted authority to enforce violations resulting from failure or willful conduct to comply with the aforementioned regulations are the Planning Department, Health Administrator, Board of Health, Sanitarian, Planning Commission, Senate, and Tribal Court. Specific enforcement authority is found in various Tribal ordinances, which describe criminal and civil offenses as well as infractions and provide penalties for violations. Furthermore, enforcement officials may enter upon regulated lands to make inspections, issue notices of violation and corrective actions, provide for a hearing, exact civil penalties, and correct a problem if the responsible party fails to do so.

3) Statement of Legal Counsel.

i. Background of the Swinomish Indian Tribal Community.

Of the Tribe's 7450-acre reservation, a significant majority (sixty-four percent) is tribally-owned, *i.e.* owned (1) by the United States and held in trust for the Tribe, (2) by the Tribe held in fee,[4] or (3) by the United States held in trust for tribal members. The remaining thirty-six percent is held in fee by non-members. The Tribe's long-term goal is to purchase more and more of the fee land, as it becomes available, for tribal use. In fact, the Tribe just completed a purchase of 750 acres of forest land. Several non-tribal businesses are located on leased tribal trust land, including a fish plant, a boatyard, and a campground. Additionally, a gated residential community is also located primarily on trust land.

Culturally, the Swinomish Tribe, like most other Coast Salish Tribes, has always been and continues to be heavily dependent on fisheries resources, especially native salmonids. As the Supreme Court stated in *United States v. Winans* with respect to Northwest tribes, fishing was "not much less necessary to the existence of the Indians than the atmosphere they

[4] The Tribe, rather than the State or County, has the sovereign right to regulate on-reservation land that is held in fee by the Tribe or a tribal member. *See generally Gobin v. Snohomish County*, 304 F.3d 909 (9th Cir. 2002).

breathed." *United States v. Winans*, 198 U.S. 371, 381 (1905). Traditionally, up to seventy percent of the Swinomish Tribe's subsistence came from fish and shellfish. Ruby, Robert H. and Brown, John A., *A Guide to the Indian Tribes of the Pacific Northwest* 230-31 (1986). Although the diets of tribal members have become much more diverse during the past century and a half, salmon and, to a lesser extent, shellfish are still culturally central to the Tribe. The Tribe's Chairman, Brian Cladoosby, and several other Tribal Senators are employed as professional fishers, as are numerous other tribal members. The Tribe issues roughly 450 licenses per year for salmon fishing, halibut fishing, and various types of shell fishing. An additional fifty plus licenses are issued annually for hunting. In 2005, fishing and shellfishing brought in a total of $3.1 million to the Tribe and tribal members, compared with $2.9 million in 2004. *See* Fish Management Swinomish Tribal Community 2005 Report, attached as Exhibit 8; Swinomish Fisheries Annual Report, attached as Exhibit 9. Smoked salmon is served at virtually every Tribe-sponsored dinner, and Dungeness crab is also served whenever it is in season. Designated uses for the on-reservation waters include but are not limited to aquatic life uses, shellfish harvesting, recreation, water supply uses, navigation uses, aesthetic uses, and spiritual/cultural uses.

ii. Current Legal Framework.

Federally recognized Indian tribes retain the right to civilly regulate both members and non-members within their reservations to the extent of their inherent sovereign authority. *See, e.g., Washington v. Confederated Tribes*, 447 U.S. 134, 152-154 (1980); *see also Montana v. United States*, 590 U.S. 544, 565-566 (1981). Although federal actions such as statutes and Supreme Court decisions may abridge tribes' inherent sovereign authority, by the same token, legislative enactments may restore such previously abridged sovereign authority. *See United States v. Lara*, 541 U.S. 193 (2004).

Through the Clean Water Act, Congress has recognized and affirmed the inherent sovereign authority of certain tribes to regulate discharge of pollutants into reservation waters. 33 U.S.C. § 1377(e); *see also* 56 Fed. Reg. 64,876, 64,878, 64,879 (1991);[5] Ann E. Tweedy, "Using Plenary Power

[5] The Environmental Protection Agency published these comments in the Federal Register before the *Lara* decision was issued. However, the Agency did note that it would "examine the Tribe's authority in light of the evolving case law." 56 Fed. Reg. 64876, 64878 (1991). Moreover, the Congressional Record clearly reflects that Congress was well aware of tribal authority to regulate non-member fee land on the reservation when it passed the CWA. *See* 133 Cong.Rec. H168-03 (1991) (memorandum from Duckeneauz/Broken Rope to Morris K. Udall, Chairman, Committee on Interior and Insular Affairs); 133 Cong.Rec. S733-02 (same). Finally, because, under Supreme Court case law, the holding in *Lara* applies retroactively; *see, e.g., Harper v. Va. Dep't of Taxation*, 509 U.S. 86, 97 (1993), the Environmental Protection Agency should examine post-*Lara* TAS applications in light of the Supreme Court's holding in *Lara*, just as the agency pledged to do when it adopted its TAS regulation. 56 Fed. Reg. 64876, 64878 (1991).

as a Sword: Tribal Civil Regulatory Jurisdiction under the Clean Water Act after *United States v. Lara*," 35 *Envtal L.* 171-190 (2005), attached as Exhibit 10. To qualify for the Clean Water Act's recognition of inherent tribal authority, a tribe must meet the requirements of 33 U.S.C. § 1377(e), namely, (1) the tribe must have a governing body carrying out substantial governmental duties and powers, (2) the water resources to be regulated "must be held by an Indian tribe, held by the United States in trust for Indians, or held by a member of an Indian tribe . . . " and (3) the tribe must be reasonably expected to be "capable of carrying out the functions to be exercised in a manner consistent with the terms and purposes of this chapter and of all applicable regulations." As amply demonstrated through the information provided in this application, the Tribe meets all of these requirements.

iii. The Tribe's Treaty Affirms Its Authority to Regulate Water Use.

The Swinomish Tribe's preexisting inherent sovereign authority to regulate environmental matters, specifically water resources, was recognized and affirmed in the Treaty of Point Elliott.[6] *See, e.g., Worcester v. Georgia*, 31 U.S. (Pet.) 515, 559 (1832) (recognizing that "[t]he Indian nations had always been considered as distinct, independent political communities, retaining their original natural rights, as undisputed possessors of the soil, from time immemorial"). The Tribe's authority to regulate water resources is a necessary outgrowth of several Treaty provisions. To begin with, both the Treaty provision stating that the Tribe's reservation is set aside for the Tribe's exclusive use and the related provision that the Tribe has the right to exclude others from the reservation implicitly recognize a right to regulate water quality. Treaty of Point Elliott, Art. 2. A third treaty provision, guaranteeing the Tribe that it will retain fishing, hunting, and gathering rights, also affirms tribal authority to regulate water quality. *Id.* at Art. 5.

First, the right to regulate water quality is inherent in the provision setting aside the reservation for the Tribe's exclusive use. *See, e.g., Colville Confederated Tribes v. Walton*, 647 F.2d 42, 52 (9th Cir. 1981). The Supreme Court has held that the setting aside of an Indian reservation also includes a set aside of the amount of water needed to accomplish the purposes of the reservation. *Winters v. United States*, 207 U.S. 564 (1908). This right applies to all water sources, including groundwater, that arise on, border, traverse, underlie, or are encompassed within Indian reservations, and the right also, in some cases, applies to off-reservation waters. *See* Felix Cohen, *Handbook of Federal Indian Law* 585 & n.51 (1982 ed.) and cases cited therein. Thus, the Tribe has a legal right to the amount of water necessary to fulfill the purposes for which the reservation

[6] As explained in *United States v. Winans*, a "treaty [is] not a grant of rights to the Indians, but a grant of right from them,--a reservation of those not granted." *United States v. Winans*, 198 U.S. 371, 381 (1905). Thus, the Treaty recognized existing, tribal sovereign rights, rather than creating new rights.

was created. Moreover, as the holder of a reserved water right, the Tribe has a concomitant legal right to protect reservation waters from degradation and contamination. *See, e.g., Tyler v. Van Aelst*, 9 Wash. App. 441, 442-44, 512 P.2d 760 (1973) (holding that the holder of a water right is entitled to an injunction preventing another party from degrading the quality of the water at issue); *see also Colville Confederated Tribes*, 647 F.2d at 52 (upholding Tribe's exclusive right, *vis a vis* the State, to regulate an on-reservation water source); *United States v. Washington*, 506 F. Supp. 187, 206 (W.D. Wash. 1980) (holding that tribal treaty fishing rights require the State to refrain from taking actions that would impair the habitat necessary to preserve the tribes' treaty-protected fishing right), *rev'd on other grounds* 759 F.2d 1353 (9th Cir. 1982); *Confederated Tribes of the Umatilla Reservation v. Alexander*, 440 F. Supp. 553 (D. Or. 1977) (issuing declaratory judgment that dam construction could not go forward without Congressional authorization because of harm to treaty-protected fisheries).

Second, the right to regulate water quality is a logical corollary of the Tribe's right to exclude nonmembers from its reservation. Because the Treaty recognizes and affirms that the Tribe has the sovereign right to exclude non-members from the reservation, the Tribe necessarily also has "the lesser power to regulate" water use on the reservation "in the interest of protecting the tribal community." *Brendale v. Confederated Tribes and Bands of the Yakima Indian Nation*, 492 U.S. 408, 433 (1989) (Stevens, J., plurality opinion) (noting that the right to exclude "necessarily must include the lesser power to regulate land use in the interest of protecting the tribal community").

Thirdly, the Tribe's authority to regulate water quality is also affirmed by the Treaty provision recognizing the Tribe's fishing, hunting and gathering rights. Treaty of Point Elliott, Art. 5. Specifically, Article 5 of the Treaty states that:

> The right of taking fish at usual and accustomed grounds and stations is further secured to said Indians in common with all citizens of the Territory, and of erecting temporary houses for the purpose of curing, together with the privilege of hunting and gathering roots and berries on open and unclaimed lands.

Id. The viability of the reservation lands and waters for fishing, shellfish gathering, waterfowl hunting, and gathering of roots and berries all depend, to differing degrees, upon high water quality. *See, e.g., Wisconsin v. Environmental Protection Agency*, 266 F.3d 741, 745 (7th Cir. 2001). Because these treaty rights could be impaired or even destroyed by poor water quality, the Tribe has the sovereign authority to protect them to the limits of its jurisdiction. *See, e.g., Colville Confederated Tribes*, 647 F.2d

at 48 (holding that tribe has a right to regulate on-reservation water use so as to protect its on-reservation fishery, the cultivation of which was one of the reasons for which the reservation was created); *United States v. Washington*, 384 F. Supp. 312, 403 (W.D. Wash. 1974) (holding that tribes have regulatory authority over treaty-protected fisheries); *see also United States v. Washington*, 506 F. Supp. 187, 206 (W.D. Wash. 1980) (holding that tribal treaty fishing rights require the state to refrain from taking actions that would impair the habitat necessary to preserve the tribes' treaty-protected fishing right), *rev'd on other grounds* 759 F.2d 1353 (9th Cir. 1982); *Confederated Tribes of the Umatilla Reservation v. Alexander*, 440 F. Supp. 553 (D. Or. 1977) (issuing declaratory judgment that dam construction could not go forward without Congressional authorization because of harm to treaty-protected fisheries); *Tyler v. Van Aelst*, 9 Wash. App. 441, 442-44, 512 P.2d 760 (1973) (holding that the holder of a water right is entitled to an injunction preventing another party from degrading the quality of the water at issue).

In sum, several treaty provisions reflect the Tribe's authority to regulate on-reservation water quality, including the provision setting aside the reservation for the Tribe's exclusive use, the provision that the Tribe retains the right to exclude non-members from the reservation, and the provision securing the Tribe's aboriginal hunting, fishing, and gathering rights.

Moreover, as discussed above, the Tribe's sovereign power to regulate water quality on its reservation was reaffirmed by Congress when it passed the Clean Water Act, which lays out three straightforward prerequisites to a tribe's being treated as a state: (1) the tribe's governing body carries out "substantial governmental duties and powers;" (2) the functions to be exercised by the tribe relate to water resources that are either within an Indian reservation, on tribally-owned land, or on land held in trust by the United States for the benefit of the tribe or a tribal member; and (3) the tribe "is reasonably expected to be capable . . . of carrying out the functions to be exercised in a manner consistent" with all applicable laws. 33 U.S.C. § 1377(e). Because the Tribe meets all of these prerequisites,[7] the CWA affirms its sovereign authority to regulate on reservation water quality. *See generally* Tweedy, *supra*, Exhibit 10. Finally, to the extent, if any, that the Tribe's sovereign authority to

[7] This application in its entirety amply demonstrates that the Tribe meets these requirements. As shown herein, the Swinomish Tribe has a governing body that carries out substantial governmental functions, including providing water and sewer services, zoning reservation lands, implementing air quality programs as well as nonpoint source management and water quality protection programs, regulating the fishing activities of its members both on and off the reservation, regulating environmental policy, and providing police and tribal court services, among many other functions. Additionally, the water bodies at issue are within the Tribe's reservation. Finally, given the breadth of the Tribe's governmental functions and its extensive experience regulating pursuant to the Clean Water Act and the Clean Air Act, as well as under the Tribal Environmental Policy Act and numerous other tribal codes, the Tribe can clearly be reasonably expected to act consistently with the Clean Water Act and all associated regulations.

regulate had been diminished between treaty time and the passage of the CWA, the CWA is properly viewed as restoring the Tribe's sovereign power to regulate water quality on the reservation. *See United States v. Lara*, 541 U.S. 193 (2004) 33 U.S.C. § 1377(e); *see also* 56 Fed. Reg. 64,876, 64,878, 64,879 (1991).

Although, based on the Supreme Court's analysis in *Lara*, the CWA is properly viewed as affirming and, as applicable, restoring tribal sovereign authority to regulate on-reservation water quality, thus rendering irrelevant the exceptions laid out in *Montana v. United States* as to the extent to which tribal civil regulatory authority has not been divested, this application nonetheless shows in detail below that the Tribe's regulation of on-reservation water quality meets the *Montana* test, as refined in subsequent cases, and that the Tribe's authority to regulate on-reservation water quality therefore remains fully viable, even without regard to the legal principals enunciated in *Lara*.

iv. Potential On-Reservation Discharges by Non-Members Threaten and Have a Direct Effect on the Health and Welfare of the Tribe.

In *Montana v. United States*, the Court recognized that tribes retain the ability to civilly regulate nonmembers on fee land within the reservation when their actions "threaten[] or ha[ve] a direct effect on the health or welfare of the tribe," as well as when the non-members have entered into a consensual relationship with the tribe. 450 U.S. 544, 566 (1981). This holding has been affirmed and expanded upon in subsequent decisions of the Court. *E.g., Nevada v. Hicks*, 533 U.S. 353 (2001); *Atkinson Trading v. Shirley*, 532 U.S. 645 (2001); *State v. A-1 Contractors*, 520 U.S. 438 (1991). While the *Montana* exceptions have been interpreted to be fairly narrow in scope in cases where there is little perceived threat to tribal self-government or to the tribe's health or welfare, *see e.g., Hicks*, 533 U.S. at 360 (upholding state officials' right to execute search warrant on the reservation); *Atkinson Trading*, 532 U.S. at 656-57 (striking down tribal tax on non-member business); *Strate*, 520 U.S. at 457-59 (holding that tribal court lacked jurisdiction to hear civil cases involving only non-members and noting that the tribe "was a stranger" to the litigation), such a narrow interpretation is inapposite when it comes to regulation of areas such as on-reservation water quality, which have an obvious potential to directly affect a tribe's health and welfare. *Wisconsin*, 266 F.3d at 747-48; *Montana v. Environmental Protection Agency*, 137 F.3d 1135, 1141 (9th Cir.), *cert. den.* 525 U.S. 921 (1998); *Montana v. Environmental Protection Agency*, 141 F. Supp. 2d 1259, 1263 (D. Mont. 1998); *see also Colville Confederated Tribes v. Walton*, 647 F.2d 42, 52 (9th Cir. 1981). Indeed, as the EPA recognizes, degradation of water quality has the potential to utterly destroy the suitability of the reservation as a tribal homeland, thereby depriving the Tribe of a primary benefit of its treaty, as well as to seriously impair its hunting and

fishing rights, which are also protected under the treaty and are centrally important to the Tribe's culture. *See* Environmental Protection Agency, 56 Fed. Reg.64,877-78 (1991) (codified at 40 C.F.R. § 131.8(b)(3)); *see also Montana*, 137 F.3d at 1139 (upholding EPA's interpretation).

To satisfy TAS requirements and to show that it retains the power to regulate water quality under *Montana* and its progeny, the Tribe is not required to show that pollution of its invaluable water sources is currently occurring or even that it is imminent. *Montana*, 141 F. Supp. 2d at 1262. Rather, the Tribe need simply show that such pollution from a non-member source could occur in the future and that, if it did, it would likely have "serious and substantial impacts" on the Tribe. *Id.* (citations and internal quotation marks omitted). There is no doubt that that Tribe meets this burden.

Thirty-six percent or almost 2,700 acres of reservation land is held in fee by non-members. Much of that land is currently classified as rural residential. Other current fee land uses include forestry, agriculture, and urban residential. Additionally, several non-tribal businesses are located on leased tribal trust land, including a fish processing plant, a boatyard, and a campground. Many non-tribal residences are also located on trust land, including a gated residential community. Finally, a small portion of trust land is leased by non-members for agricultural use. As shown below, activities by non-members on both trust and fee land have the potential to directly affect the Tribe's health and welfare and economic security and to have serious and substantial impacts upon the Tribe.

- Residential Use.

Residential use can cause serious water quality problems in its own right. Chemicals commonly applied by residential users, such as pesticides, herbicides, and fertilizers, make their way to streams where they increase temperatures, turbidity, bacteria and nutrients and decrease the levels of dissolved oxygen. Transmission of these substances to streams and other water bodies is especially likely in rainy Western Washington, where the reservation is located. Similar effects result from failing septic tanks, which have been a serious problem in Similk and Turner's Bays where shellfishing areas have had to be closed due to fecal coliform levels that exceed Washington Department of Health safe levels. Furthermore, residential use almost invariably results in increased impervious surface. The water quality problems caused by increased impervious surface are well-documented and include: increased erosion, increased toxic load, increased sediment load, increased temperature, increased flooding, diminished groundwater reserves, diminished areas for habitat, diminished fish populations, and diminished surface water levels. Finally, residential use also may result in land disturbances, such as clearing and grading, which can increase run-off and/or infiltration, both of which change flow

patterns and increase the likelihood that the above-identified pollutants will enter watercourses and/or groundwater.

- Agricultural Use.

Agricultural land use also brings with it a host of water quality problems. Like residential use, agricultural use results in increased chemical and nutrient application, causing eutrophication, which in turn results in decreased dissolved oxygen and increased temperature, turbidity, and toxics. Agricultural use also is associated with land disturbances, such as tilling and grading, which often increase run-off and/or infiltration, as well as the potential for chemicals to enter waterways and/or groundwater. Finally, agricultural use, particularly hobby farms, result in the introduction of animal waste into streams and groundwater sources. This increases the bacteria and nutrient levels in the watercourses.

- Forestry.

Forestry uses, such as logging, also cause water quality problems. Like agricultural and residential use, forestry is associated with both increased chemical application and land disturbances. In the case of forestry, the land disturbances include tree removal and grading of roads. Because cutting down trees also decreases water absorption by trees and grading of roads increases impervious surface, forestry also causes increased run-off and erosion. Thus forestry results in decreased dissolved oxygen and increased temperature, turbidity, run-off, and toxics.

- Illegal Dumping and Transportation.

Both illegal dumping and transportation uses have the potential to adversely impact water quality. Illegal dumping is the disposal of household waste and hazardous materials in locations other than a regulated disposal facility. Transportation uses include general purpose and commercial automobile and truck traffic on roads and driveways, boat traffic in waterways, train traffic on railroads, and conveyance of fuel in pipelines. These practices may result in: increased roadway run-off; automobile, truck, train, and boat wastes; oil pipeline discharges; fuel or cargo spills on roads, rails, or in waterways; and boat discharges. Such occurrences cause increased turbidity, toxics, and runoff.

- Commercial/Industrial Use.

Like many other types of uses, commercial and industrial use can involve chemical application, including pesticides, herbicides, and fertilizers, which increase water temperature, dissolved oxygen levels and turbidity. Chemical and industrial use, especially related to operation of machinery,

is also commonly associated with commercial use. This can increase the level of toxics in water sources. Finally, commercial and industrial use almost invariably increases impervious surfaces, which in turn results increased run-off. Increases in run-off change the flow patterns of streams. Additionally, increased run-off increases the likelihood that damaging materials will make their way to surface water sources because the water would otherwise be cleansed by filtering through the ground.

♦ Urban Residential Use.

Urban residential use increases impervious surfaces, thereby increasing run-off and the likelihood that damaging materials will enter watercourses. Urban use also increases the likelihood of gasoline and oil run-off from cars and trucks, as well as the likelihood of chemical application, including pesticides, herbicides, and fertilizers. Thus, collectively, urban use causes increases in temperature, turbidity, quantity of water in the streams during rainy periods (due to increased run-off), and toxics, and it decreases dissolved oxygen,.

The potential effects described above are both serious and substantial and, should they come to pass, would have a direct, extremely detrimental effect on the Tribe's health and welfare. Accordingly, under the CWA and the regulations adopted by the EPA, the Tribe has met its burden to show that it has the sovereign authority to regulate water quality within reservation boundaries. The Tribe's application for TAS should be approved.

v. Potential On-Reservation Discharges by Non-Members Would Also Have Serious and Substantial Effects on the Tribe's Economic Security.

As stated above, fishing and shell fishing bring in $3 million to the Tribe and tribal members annually. Exhibits 8 & 9. Needless to say, almost any small community would be significantly affected by the loss of such a substantial amount of revenue. However, the average income among members of the Swinomish Tribe, like those of many tribes, is well below the average income of non-members in Skagit County, which is adjacent to the reservation, and other nearby areas. In 1993, before tribal shell fishing was judicially approved in Washington, an economist noted that, on average, thirty-three percent of tribal members from select tribes (including the Swinomish Tribe) lived in poverty compared to a State average of eleven percent and a national average of thirteen percent. *See* Philip A. Meyer, "Analysis of the Material Circumstances of 17 Washington Tribes (July, 1 1993), at 12, attached as Exhibit 11. Mr. Meyer estimated that permitting tribes collectively to take a fifty percent share of shellfish, as was subsequently allowed, *United States v. Washington*, 873 F. Supp. 1422 (W.D. Wash. 1994), *aff'd in part and rev'd in part* 157 F.3d 630 (9th 1998), would raise the tribal per capita income by over $2,000, which equated to an average increase in income of over thirty percent. Exhibit 10, at 30; *see also*

Excerpt adapted from Meyer Resources, Inc., 1997. "Northwest Tribal Values on the Land: A Study of Values that Northwest Tribes Associate with Streams, and with Associated Land Areas in Watersheds. A Report to the Northwest Indian Fisheries Commission, Olympia, WA," attached as Exhibit 12 (discussing the value of water resources to support fisheries for Northwest Tribes).

A 2005 report by Mr. Meyer indicates that thirty-six percent of Swinomish members now live in poverty (compared to eleven percent of Washington State residents). *See* Philip A. Meyer, "A Review of Two Documents from the Washington Department of Ecology" (March 15, 2005), at 5, attached as Exhibit 13. This figure is corroborated by a 2001 Bureau of Indian Affairs unemployment statistic for the Tribe of nearly 42%. *See* Letter from DSHS, attached as Exhibit 14. Clearly, to those living at or near the poverty level, as over a third of the Tribe's nearly 800 members currently do, a loss of almost three million dollars, which would hit both individual tribal member income and tribal governmental services (because of lost tax revenue), would be devastating.

As detailed above, non-member activities have the potential to seriously and substantially harm tribal waters, which would, in turn, as has happened in the past with the septic failures in Turner's and Similk Bays, impair the fisheries resources that are economically and culturally invaluable to the Tribe. Thus, based on the figures cited above and the paramount importance of finfishing and shellfishing to the Tribe, there is no question that on-reservation discharges by non-members have the potential to have serious and substantial effects on the Tribe's economic security.

vi. Numerous Non-Members Who Live or Work On-Reservation Have Entered Consensual Relationships with the Tribe.

In addition to jurisdiction under the *Montana* exception for matters that are likely to adversely affect a tribe's economic security or health or welfare, the Tribe also has authority to regulate non-members on tribal land because they have entered consensual relationships with the Tribe by leasing its land. As *Montana* held: "A tribe may regulate,. . . . the activities of nonmembers who enter consensual relationships with the tribe or its members, through commercial dealing, contracts, leases, or other arrangements." 450 U.S. at 565. Not only does the Supreme Court in *Montana* specifically mention leases, but other courts have held that such commercial dealing is the gravaman of the consensual relationship exception. *United States ex rel. Morongo Band of Mission Indians v. Rose*, 34 F.3d 901, 906-07 (9th Cir. 1994); *see also Atkinson Trading Co., Inc. v. Shirley*, 532 U.S. 645, 655 (2001). Moreover, the requirement that the challenged regulation have a nexus to the consensual relationship, *Atkinson Trading Co., Inc.*, 532 U.S. at 656, is also met here because numerous residential and business leases contain a requirement that the lessee (and in some cases, their customers as well) abide by tribal laws.

For example, the lease of a one hundred plus acre campground requires the lessee to "post the subject property notifying . . . members that they are subject to Tribal laws and law enforcement while present within reservation boundaries." Lease Amendment No. 2 to Campground Lease, ¶ XXXI, attached as Exhibit 15. Similarly, numerous residential leases contain language requiring the lessee to abide by tribal law as a condition of the lease. One common clause is that "[i]t is a condition of this lease that the Lessee shall faithfully comply with all ordinances or resolutions, as approved by the Secretary of the Interior, enacted by . . ." the Swinomish Indian Tribal Community. *See* Samples of Residential Leases ¶ 18, attached as Exhibit 16. Such leases also contain a provision requiring the lessee to "promptly pay all taxes, assessments, license fees and other like charges levied against the Lessee by the Tribe during the term of the lease." *Id.* at ¶ 19. Another common provision of residential leases is captioned "Observance of Law" and requires the lessee to "observe and adhere to all laws, ordinances, rules and regulations now or hereafter adopted by the Swinomish Indian Tribal Community." More Samples of Residential Leases, § 4, attached as Exhibit 17. Similarly, the two master leases for the planned residential community both require the lessee to "comply with all applicable water pollution control laws . . . in the construction of all sewerage systems, sewerage treatment or disposal plants or systems, or in the improvement or extension of any sewerage plant or sewage treatment or disposal plants. *See* Excerpts of Lease Numbers 5020 and 5086, attached as Exhibit 18.

Clearly, by signing these leases, non-member lessees enter consensual relationships that subject them to tribal civil regulatory jurisdiction, including regulation under the Clean Water Act. There is no question but that such lessees fall under *Montana*'s exception for those who have entered consensual relationships with the Tribe.

Thus, the Tribe has civil regulatory jurisdiction over non-members found on the reservation on multiple bases. First, Tribes have jurisdiction under the Clean Water Act and *United States v. Lara* because the Clean Water Act recognized and affirmed tribal sovereignty over on-reservation water quality. Second, the Tribe has civil regulatory jurisdiction under *Montana* on three bases: (1) the potential effect of water quality problems caused by non-members on the Tribe's health and welfare; (2) the potential effect of such water quality problems on the Tribe's economic security; and (3) the fact that numerous non-members found on the reservation have entered consensual relationships with the Tribe that have a sufficient nexus to the proposed regulatory authority to establish jurisdiction.

4. The Tribe Proposes to Establish Water Quality Standards for the On-Reservation Portion of the Following Surface Waters.

Some of the descriptions below pertain to the entire water body, despite the fact that only a portion of it is on the reservation. Consistent with the Clean Water Act, the Tribe seeks to apply its water quality standards to only those portions of the water bodies within the

reservation, as described in Part II.C.1.

A) Listing of Water Bodies.

1. Padilla Bay
2. Padilla Bay lagoon
3. Similk Bay
4. Turner's Bay
5. Kiket Bay
6. Lone Tree Lagoon
7. Lone Tree Creek
8. Skagit Bay
9. Skagit River Delta
10. Snee-Oosh Creek
11. Swinomish Channel
12. Munks Creek
13. Fornsby Creek
14. Others:
    Named and unnamed palustrine and marine wetlands
    Named and unnamed intermittent streams
    Unnamed springs and seeps
    All delineated, inventoried, undelineated, and uninventoried wetlands.

B) Division of Ownership, Description, Water Quality, Tribal Water Resource Use, Environmental Sensitivity Status of Named Waterbodies[8]

1) Padilla Bay and Lagoon

i. Approximate division of ownership on the Reservation.

The entire Padilla Bay watershed encompasses 23,000 acres, 118 of which are within the regulatory boundaries of the Swinomish Reservation. The land adjoining the bay within the regulatory boundaries of the Reservation has approximately three-fourths of the shoreline in tribal trust land, and one-forth of the shoreline in individual trust land. The Padilla Lagoon is located west of the Swinomish Casino and in between the individual and tribal trust land. The Padilla Lagoon is located west of the Swinomish Casino and in between the individual and tribal trust land.

ii. Description.

Padilla Bay is a shallow estuarine bay located between Samish and Fidalgo islands. The portion of Padilla Bay within the Reservation

[8] With the exception of tidelands on the east side of Turner Bay, which are privately owned, all of the applicable tidelands between the Ordinary High Water Mark and the Extreme Low Water Mark are owned by the United States in trust for the Tribe.

regulatory boundary is a shallow, very gently sloping, channeled mudflat that supports extensive eelgrass beds and salt marshes, and includes the Padilla Lagoon. Much of the bay de-waters at low tide, particularly the Lagoon. A navigable channel was excavated across the mudflats connecting the Swinomish Channel to deep water. The net northerly flow of the Swinomish Channel, which includes a portion of Skagit River water, also enters and mixes with Padilla Bay water. Heron, bald eagles, peregrine falcons, and other birds nest and feed within the watershed. The rich mudflats of Padilla Bay also support salmonids and other aquatic life (Cordell, 1986).

iii. Water Quality.

Surface water quality within Padilla Bay is generally good based on available data. Localized fecal coliform problems in Padilla Bay and Lagoon have been detected but have not reached beyond maximum exceedence criteria based on draft Tribal water quality standards. The fecal coliform problems are likely the result of ongoing non-point source pollution as well as a known failed septic system nearby. Turbidity has exceeded proposed water quality standards.

Padilla Lagoon has experienced some very high temperatures that are likely due at least in part to natural conditions that result in low dissolved oxygen. Turbidity and pH water quality criteria problems are also likely partly caused by natural conditions in shallow marine waters and wetlands.

In addition to temperature-related problems, a toxics in marine sediments screening s conducted by the Water Resources Program in 2002 suggested that low levels of metals and volatile organic compounds are present in the Padilla Lagoon. Several of the chemicals sampled at the Padilla Bay Lagoon exceeded one or more of the criteria guidelines. Further study has been recommended to determine the extent of potential health risks. Leachate from the Whitmarsh dump, surface runoff from the railroad bridge and nearby parking lots, and agricultural and industrial runoff into Padilla Bay are potential sources of contamination at this site (Noffke, 1998a).

Like Padilla Lagoon, Padilla Bay is at risk from adjacent land uses off Reservation that include oil refineries, crop and dairy agriculture, and the abandoned Whitmarsh landfill which is located on the beach of Padilla Bay only a few meters from the Reservation regulatory boundary. In addition, several nearby industries including two oil refineries, major marine tanker facilities, a chemical production plant, and a natural gas co-generation facility are located on March Point, just west and northwest of the Reservation tidelands. Padilla Bay water quality has been impaired

with respect to PCBs. Potential sources of PCB pollution are predominantly off Reservation (Unified Water Assessment, 2001, 17), and therefore would not generally be governed by tribal water quality standards.

iv. Tribal Water Resource Uses.

The Tribe has traditionally used Padilla Bay for fishing of salmon, hunting of birds and harvesting of shellfish - especially crabs. The Tribe currently utilizes Padilla Bay for these purposes to a much lesser extent. It is in the interest of the Tribe to preserve the extensive network of eelgrass beds that make up Padilla Bay to ensure future salmonid fisheries survival and abundance.

v. Environmentally Sensitive Status.

A large area of the non-Reservation portion of Padilla Bay has been set aside as a National Estuarine Research Reserve. The Padilla Bay ecosystem is unique and vital to ensuring salmonid fisheries survival and abundance and the health of numerous other important species. In addition to providing important food sources for many aquatic and wildlife species, breeding areas for two endangered species, bald eagle and peregrine falcon, are located within the surrounding watershed. A heron rookery, brandt graveling area, and seagull root and/or rookery is also located in the watershed at the edge of the Swinomish regulatory boundary.

2) Similk and Turner's Bay.

i. Approximate division of ownership on the Reservation.

All of the land within the regulatory boundaries of the Reservation adjoining Turner's Bay is fee land. Of the land adjoining Similk Bay that is within the regulatory boundary of the Tribe, approximately two-fifths of it is individual trust land and three-fifths of it is fee land. About half of the uplands draining to Similk and Turner's Bays are within the regulatory boundary of the Swinomish Indian Reservation.

ii. Description: Turner's Bay.

Turner's Bay is a small, shallow estuarine wetland jutting northward off the main body of Similk Bay. It consists of mudflats and small tidal lagoons that drain into one small, shallow deepwater basin that, in turn, drains to Similk Bay. Three sand and gravel spits extending into the bay define the lagoon. Most of the bay de-waters at low tide to expose channeled mudflats. The head of the bay grades into a freshwater marsh fed by storm water runoff and Turner's Creek. Within the bay, unvegetated mudflats, sandbars, small eelgrass beds, and salt marshes are home to numerous waterfowl, herons, and plentiful shellfish and other aquatic life.

iii. Description: Similk Bay.

Similk Bay is a shallow, bowl-shaped bay surrounded by moderately sloping shores, barrier islands, and wetlands. The Bay receives water from storm water runoff from uplands in the watershed, Turner's Bay, Turner's Creek, and from marine and fresh water flushing through Skagit Bay and Deception Pass. Circulation patterns within the bay are influenced by tidal patterns exiting and entering Deception Pass from the southwest. Kiket and Skagit Islands form a natural barrier partially isolating Similk Bay from Kiket Bay and the greater Skagit Bay and from the main influence of the Skagit River. High tide salinities are as high as well-mixed estuarine waters of Puget Sound, although Similk Bay exhibits slightly depressed salinities due to freshwater influx from the Skagit River and Turner's Bay.

Almost the entire upland basin in Similk and Turner's Bay watershed within the Reservation is zoned for Forestry. The small number of homes within the watershed have on-site septic systems and private wells.

iv. Water Quality.

Water quality conditions in northwest Similk Bay and Turner's Bay have been impaired by fecal coliform contamination. Fifteen percent of measured fecal coliform concentrations in Turner's Bay exceed proposed Tribal water quality maximum exceedence standards. The increased bacterial levels are believed to be related to failure of septic systems on residential parcels along the Bays' shoreline both on- and off-reservation. These ongoing bacterial problems have resulted in closures to shellfish harvest in some areas of the basin. However, in recent years both the county and Tribe have under taken ongoing septic system repairs and upgrades, both on and off Reservation, to limit bacteria inputs into the bay. Shallow areas in Turner's Bay also have sub-optimal temperatures during summer due to natural conditions. Dissolved oxygen readings commonly failed to meet proposed standards during these high

temperature periods. The waters usually, but occasionally do not, meet pH standards.

Other current and future potential sources of pollution include runoff from lawns and gardens, runoff from roads and in-bay boat traffic, residential septic systems, on-reservation logging practices and construction activities, and natural erosion and coastal landslides along the shoreline bluff. In addition to all on-reservation sources of pollution, Similk and Turner's Bay are at risk from adjacent land use activities off-Reservation including runoff from storm water ditches and culverts and a golf course.

v. Tribal Water Resource Uses.

Historically, the waters of Similk and Turner's Bays have been heavily utilized for subsistence shellfish harvesting; salmon, smelt, herring, steelhead and chum fishing by tidal fish traps and other methods; and duck hunting. The Tribe currently utilizes the rich waters of Similk Bay for commercial, subsistence, and ceremonial fishing, and harvesting of crabs and clams including butter, horse, manila and littleneck. Turner's Bay supports abundant shellfish as well: clams in the intertidal areas and crabs in the deeper water.

In the future, the Tribe hopes to utilize the shellfish beds for potential commercial harvest and to restore the fisheries resources to their historic levels (Swinomish Comprehensive Plan, 1996). The landscape surrounding Similk and Turner's Bays is also of high scenic value due to the water resources.

vi. Environmentally Sensitive Status.

Shorelines in Similk Bay have been designated as shorelines of statewide significance by the State of Washington. Turner's and Similk Bay are environmentally sensitive due to the abundant wildlife and aquatic life that rely on this habitat for spawning, feeding and refuge. Both bays offer spawning habitat for herring with eelgrass beds that extend well up into the tidal drainage channel of Turner's Bay. The salt marshes and freshwater wetlands of Turner's Bay also provide important habitat for juvenile salmonids, including Coho salmon that have been found in the upper bay (Wyman, unpublished field report, 1996). The sand and gravel shores host spawning habitat for smelt and sand lance (Penttila, WDFW, 2000). The plentiful shellfish resources include littlenecks and manila clams- significant species to the subsistence harvest of the Swinomish Community. Eagles, herons and other waterfowl frequent the shallow waters of these bays to feed and seek refuge, as do harbor seals and fish.

3) Kiket Bay and Lone Tree Creek Lagoon.

i. Approximate Division of Ownership on the Reservation.

About three-fourths of land adjacent to Kiket Bay is fee land, with the remaining quarter of the bay, specifically the area surrounding Lone Tree Point, in tribal trust land.

ii. Description.

Kiket Bay is a broad, 36-meter deep basin semi-enclosed by barrier islands and bedrock reefs. Hope Island and the reefs extending between Lone Tree Point and Hope Island mark the south boundary of the bay, while Kiket Island and Skagit Island mark the north boundary. Beaches and intertidal zones within the watershed are sand and/or gravel or bedrock.

An arm of rock extending from Lone Tree Point encloses a small estuarine salt marsh to the north, known as the Lone Tree Creek Lagoon that drains completely or near-completely at low tide. The shoreline substrates of Lone Tree Point lagoon and area near the lagoon opening are mud, sand and gravel.

The Kiket Bay watershed is hydrologically influenced by marine water, Skagit River water, storm water runoff, and seasonal flow from Lone Tree Creek. The intertidal and beach zones near Lone Tree Point and north to the Kiket Island causeway support patchy salt marsh vegetation. Bull kelp forests and small eelgrass beds occupy the subtidal zone immediately off Lone Tree Point. Shellfish, salmon, seals, crabs and other marine life make use of Kiket Bay as do numerous other bird and wildlife species including bald eagles, herons, osprey, deer, red foxes, bobcats, elk, and many other small mammals (Mayer, 1973; Stober and Salo, 1973; Houghton, 1973; Swinomish Comprehensive Plan, 1996).

Kiket Bay shoreline is more built-out than Similk and Turner's Bays, with homes lining the shore north and south of Lone Tree Point. The homes have on-site septic systems and private or community wells. The uplands have had significant logging that also can impact the water quality of the bay. Snee-Oosh Road and many smaller roads also exist within the watershed.

iii. Water Quality.

Except for Lone Tree Point Lagoon, Kiket Bay water quality is good. Periodic shellfish tissue sampling has yielded bacteria concentrations that slightly exceed commercial harvest human health limits 25% of the time (Non-point Source Pollution, OPCD, 28). Some sources of past water quality criteria exceedences for fecal coliform have been eliminated by the

extension of sewer transmission service and capping of a sewer district outfall in Skagit Bay just below the east Hope Island passage that may have been impacting water quality in Kiket Bay watershed prior to 1995. Contamination from the Thousand Trails recreational vehicle campground located in the watershed may also contribute to elevated bacterial levels.

iv. Tribal Water Resource Use.

Historically, Lone Tree Point has been the site of a culturally valuable traditional Tribal beach seining operation to catch salmon including pink, humpies, and coho (Tribal informants, 2004). The Lone Tree Point seining operation continues to this day. Kiket Bay has also been utilized for subsistence shellfish harvesting, salmon, smelt, herring, and steelhead fishing. The Tribal Community additionally utilizes the beaches at Lone Tree Point for subsistence and ceremonial fishing, crabbing, and shellfish harvesting and family and Tribal recreational activities. Abundant juvenile salmonids make use of the shoreline area all around the bay (Klochak, pers. comm., 1997). Salmon fry also may use the Lone Tree Point Lagoon for resting.

Current restoration projects are working towards restoring fisheries resources here to historic levels. Other future Tribal economic opportunities besides fisheries and shellfish noted in the Swinomish Comprehensive Plan include high-density residential in-filling along the shoreline and low-density in-filling east of Snee-Oosh Road. Future developments may also include extending sewer and/or water transmission service to homes at the south end of Kiket Bay and to the campground.

v. Environmentally Sensitive Status.

These waters are environmentally sensitive due to the abundant wildlife and aquatic life that rely on this habitat for feeding and refuge, and the high use made of the water and land resources by humans. The salt marshes and kelp forests provide important habitat for juvenile salmonids and other aquatic life.

4) Lone Tree Creek.

i. Approximate Division of Ownership on the Reservation.

Lone Tree Creek begins on fee land and flows into individual trust land before returning to fee land. About half way through, the stream flows onto the campground Thousand Trails that is on tribal trust land.

ii. Description.

Lone Tree Creek is an ephemeral stream that flows during the wet season, usually from October through April. However, Reservation residents have reported that this creek historically flowed year-round. The stream originates in a forested wetland and flows approximately 4000 feet into Lone Tree Point lagoon. The sub-basin drains an area of approximately 608 acres. The upper reach of the creek, above Snee-Oosh Road, follows a gently sloped course through rural residential lots and small shrub and mixed forest until reaching the campground. Substrate sediments within this natural reach consist of gravel and fine sand with some silt. Stream banks are predominantly clay with mixed sand, gravel, and rare cobbles derived from glacial till. The creek enters storm-water ditches at Snee-Oosh Road and is piped across the road and under a parking lot for approximately 30 feet. The lower reach, below Snee-Oosh Road, flows in a constructed channel through a campground sparsely vegetated with conifers, deciduous trees, and shrubs. Storm-water runoff within the lower reach of the sub-basin is collected in ditches and pipes that discharge to the creek. Substrate sediments within the lower reach consist of medium to fine gravel, sand, and vegetated soil.

iii. Water Quality.

Lone Tree Creek's water quality is marginal. Several of the conventional parameters exceed draft Tribal water quality standards. Dissolved oxygen levels as well as fecal coliform measurements have failed to meet the draft Tribal standards. High bacteria levels are likely due to upstream non-point pollution sources and may be exacerbated by low flows. Low in-stream flows and non-point source pollution within the watershed are negatively impacting the creek. Low flows are evident in all Reservation streams and can result in fine sediments settling into interstitial spaces between gravels, impacting and limiting macroinvertebrate organisms and potential salmonid spawning habitat. Additionally, low flow stream environments limit habitat complexity and biodiversity. Low flows also create shallow conditions that result in marginally high temperatures and associated low dissolved oxygen that can be fatal to fish and other aquatic life.

This creek also flows through a campground, which operates pump-out stations for recreational vehicles and a sewage lagoon and septic spray field. Different parts of this system may have failed at different times to introduce bacteriological contamination to the creek from time to time. In addition, hobby farms and residential septic systems within the sub-basin may be impacting the creek. Planned extension of Tribal sewer transmission lines to the campground and homes within the sub-basin may reduce bacterial pollution entering the creek. Proposed restoration projects are geared toward improving in-stream flows, dissolved oxygen, temperature and bacterial problems.

iv. Tribal Water Resource Use.

Historically, Lone Tree Creek likely provided fresh drinking water for the tribe when they were engaged in beach seining at Lone Tree Point (Tribal Informants, pers, comm., 2004). As a perennial creek, Lone Tree Creek may have provided habitat for fish and wildlife year-round. Wildlife and fish, including salmon species, utilize Lone Tree Creek during the wet season.

v. Environmentally Sensitive Status.

The primary significance of this creek now and in the future, unless flow levels increase, is how creek waters impact water quality in Kiket Bay and groundwater quality in shallow nearby wells. Flow and creek habitat conditions preclude salmon spawning but salmon are found yearly in the lowest reach of the creek.

Lone Tree Creek enters Kiket Bay at Lone Tree Point lagoon-- a sensitive salt marsh wetland (pocket estuary) used by migrating salmonids. The lagoon is also immediately adjacent to tribal shellfish beds. Therefore, any pollution carried by the creek directly impacts important fish and shellfish resources. Bald eagles and osprey also nest in this sub-basin.

5) Snee-Oosh Creek.

i. Approximate division of ownership on the Reservation.

Snee-Oosh creek is located entirely on individual trust land.

ii. Description.

The creek flows from a large forested wetland near the crest of the Reservation uplands and enters the bay at the northern edge of the mudflats. The sub-basin is approximately 424 acres in area. The creek carves a steep-sided gorge through mixed conifer and deciduous forest. Substrate sediments include gravel and cobbles, with sand, clay and organic deposits in pools and boggy areas.

iii. Water Quality.

The overall water quality of Snee-Oosh Creek is good to marginal, however low in-stream flows and non-point source pollution within the watershed are negatively impacting the creek. Anecdotal evidence and limited scientific evidence suggest that low creek flows are a recent

development. Increasing development and use of groundwater resources within the Snee-Oosh Creek watershed may be impacting groundwater base flow into the creek. Groundwater base flow constitutes all of the creek flow during most of the summer. Low flows can result in fine substrate sediments settling into interstitial spaces between gravels, impacting macroinvertebrate organisms and potential salmonid spawning habitat. Additionally, low flows create geomorphic conditions that can result in the evolution of low habitat complexity, which limits biotic diversity. Low flows also create shallow conditions that result in marginally high temperatures and associated low dissolved oxygen that can kill fish and other aquatic life.

Ongoing, sporadic fecal coliform contamination exceeds water quality standards. The source of this contamination is unknown but may be related to failing septic systems, human and animal activity, or storm runoff. Dissolved oxygen is often below water quality standards during summer months. High turbidity and fine sediments observed in Snee-Oosh Creek impair the channel environment and may be related to logging, residential construction, or road construction.

Non-point pollution in the Snee-Oosh Creek sub-watershed comes entirely from on-Reservation sources. Existing potential pollution sources include runoff from lawns, gardens, parks, and roads, as well as forest and construction practices. Future increases in housing density may potentially introduce more of the same kinds of pollutants into Snee-Oosh Creek.

iv. Tribal Water Resource Use.

Though few salmonids have been observed in this creek in recent years, Snee-Oosh Creek has historically been an anadromous fish-bearing stream and has been designated appropriate for possible remote site egg incubator development that may provide for fisheries enhancement in the future. The creek has also been utilized for drinking water in the past.

v. Environmentally Sensitive Status.

Currently the creek provides important habitat for aquatic life and wildlife. Riparian zone and in-stream restoration efforts conducted during 1996 have successfully enhanced the stream ecosystem. Continued monitoring and enhancement efforts could return this creek to a productive, fish-bearing water resource.

6) Skagit Bay.

i. Approximate division of ownership on the Reservation.

The boundary of the portion of Skagit Bay within the regulatory boundaries of the Tribe begins north at Hope Island and ends at the most eastern point of land--Eagle's Nest where the Swinomish Channel begins. Given these delineations, at least three-fifths of the shoreline is in individual trust with the rest being made up of fee lands.

ii. Description.

Skagit Bay is a large waterbody extending south from Hope Island to Camano Island. The north half of the Reservation portion of Skagit Bay comprises a 40 meter deep basin. The south half of the Reservation portion of Skagit Bay includes expansive mudflats, sand bars, and patchy eelgrass meadows that de-water at extreme low tide. Skagit Bay is connected to Deception Pass by a deep trough that runs along the eastern shore of Whidbey Island. Cobble and gravel beaches below steep bluffs rim the mudflats and deep basin north of Pull and Be Damned Point. Snee-Oosh Creek enters Skagit Bay at the northern edge of the mudflats. Flow from the Skagit River depresses salinities and strongly influences the character of the water in Skagit Bay.

A large portion of the Skagit Bay watershed is zoned for Urban Residential development in Shelter Bay and is densely developed. Most homes within the watershed are on community sewer lines. Planned future uses within the Skagit Bay watershed may include increased housing density within the Urban and Rural Residential zones and in Shelter Bay.

iii. Water Quality.

Historic water quality data for Skagit Bay show that in the past the bay has failed to meet proposed Tribal water quality standards for fecal coliform. This pollution has since been minimized by the extension of sewer transmission services to these residential areas in the 1990s. Recent water quality monitoring shows no impairments at this time. However, excessive algae production, reported by local residents to be recent, may point to nutrient loading from a more recent source along the west shore.

Runoff and leachate from a recently capped and closed seventeen-acre dumpsite (a former gravel pit) may have impacted water quality in the past (Non-point Pollution Assessment, 2000). Potential non-point pollution sources include runoff from lawns and gardens, runoff from roads and boat traffic, and increased turbidity due to construction and logging practices. Logging may also increase nutrient loading. Skagit Bay is also subject to pollution flowing in via the Skagit River and associated sloughs and other off-Reservation sources. Under the current zoning, future increases in housing density may potentially introduce more of the same

kinds of pollutants into Skagit Bay.

iv. Tribal Water Resource Uses.

Historically, Skagit Bay, rich in numerous species of salmon, was the site of a community fishing camp and a Tribal fish trap that was located south of Snee-Oosh Creek. Located along the Pacific Flyway zone, traditional bird hunting also occurred in Skagit bay.

However, construction of the Swinomish Channel jetty changed Skagit Bay significantly by diverting some flow from the Skagit River (Borland, 1976). Mudflats have grown in size by as much as 2700 feet and wave amplitudes have changed, impacting tidal elevations (Borland, 1976). These changes likely resulted in the elimination of former oyster beds and fishing areas. The fish now bypass areas they once frequented for deeper waters much farther from the shore and outside Reservation boundaries. Oyster beds, clams, crabs and other shellfish resources near Deadman Island accessed by the community as recently as 30 years ago are no longer productive. The Tribal Community currently utilizes Skagit Bay waters for subsistence and commercial fishing, shellfish harvest and crabbing, picnicking and swimming. The salt marshes and eelgrass beds provide important habitat for juvenile salmonids that the Tribe has an interest in preserving to ensure salmonid fisheries survival and abundance (Cordell, 1986). The Tribal fishing fleet also uses the navigable channels across the Skagit Bay mudflats. In the future, the Tribe hopes for restored fisheries resources and increased harvest in Skagit Bay.

v. Environmentally Sensitive Status.

Shorelines in Skagit Bay have been designated as shorelines of statewide significance by the State of Washington. These waters are environmentally sensitive due to the abundant wildlife and aquatic life that rely on this habitat for feeding and refuge. Smelt and sandlance spawn along the Snee-Oosh shoreline. Eagles and heron and other waterfowl frequent the shallow waters of Skagit Bay to feed and seek refuge, as do harbor seals and fish. The salt marsh and mudflat ecosystem within Skagit Bay is important to ensure salmonid fisheries survival and abundance. These wetlands also serve to improve water quality.

7) Skagit River Delta.

i. Approximate division of ownership on the Reservation.

The shoreline surrounding all of McGlinn Island is in tribal trust, but the shoreline across from the east side of McGlinn island is not within the regulatory boundaries of the Tribe.

ii. Description.

Though tidally influenced, river water predominates in this small bay east of McGlinn Island. This fresh water influx is the reason the waterbody has been identified and treated as separate from Skagit Bay. The wetland is a network of sandbars, mudflats, braided channels and grass islands that grade into an estuary in Skagit Bay. Aquatic plants grow throughout the wetland. McGlinn Island has been set aside as open space for waterfowl and Tribal community uses. The wetland is host to a diverse community of birds, waterfowl, and other wildlife. Eagles frequently hunt in the area and nest nearby. A seagull rookery is located on one of the grass islands. Juvenile salmonids migrating out of the Skagit River system also utilize the wetland's rich habitat.

All of the land within this sub-basin is zoned for open space. Currently, one shelter exists within the area and is used periodically. The shelter is reached via a gravel road. A boat repair and haul out facility exisis on site and is presently leased to non-tribal operators.

iii. Water Quality.

Overall water quality within the Reservation portion of the Skagit River Delta is good. Ambient monitoring yielded occasional water quality problems due to fecal coliform bacteria, high temperatures, low pH, low dissolved oxygen, and turbidity. These may be related to natural conditions or up-river sources. Low pH and dissolved oxygen may be related to nutrient loading and associated bacterial-algal growth. The sporadic high fecal coliform concentrations may be the result of ongoing non-point source pollution. Contaminated groundwater and surface water entering the river could originate from failing or ineffective septic systems, leaky sewer lines, sewage treatment plant outfalls, and land application of treated effluent.

Current water quality data for the Skagit River Delta indicate that these waters occasionally exceed proposed water quality standards for turbidity, fecal coliform, temperature, and pH. This waterbody is influenced almost entirely by off-Reservation land use practices and activities via flow from the Skagit River and Sullivan Slough. (Non-point Source Pollution, OPCD, 29). Incoming tides may also carry pollution from adjacent watersheds. Skagit River basin uses include agriculture, dairy production, clear-cut logging, rural to urban residential, commercial, and industrial uses, and recreation.

On-Reservation lands adjacent to the Skagit River Delta wetland system

are very low use areas. Existing potential sources of pollution from on-Reservation include increased turbidity from natural erosion, and a small amount of runoff from occasional use of a gravel road. If construction plans for a cultural museum go ahead, runoff from roads and parking lots with increased traffic may introduce hydrocarbons to the wetland. Runoff from landscaped areas may introduce nutrients and inorganic chemicals from herbicides, pesticides, and fertilizers. In addition, air-borne chemicals from the boat yard and bacterial contamination from the museum septic system may also enter the wetland.

iv. Tribal Water Resource Uses.

The Tribal Community currently utilizes the Skagit River wetland for subsistence and ceremonial fishing, duck hunting, and swimming. In the future, the Tribe hopes to restore the fisheries resources to historic levels, which includes restoring and maintaining habitat in and around the Skagit River Wetland for juvenile and adult salmonids (Swinomish Comprehensive Plan, 1996).

v. Environmentally Sensitive Status.

These waters are environmentally sensitive due to the abundant wildlife and aquatic life that rely on this habitat for feeding and refuge, especially juvenile and adult salmonids, eagles, waterfowl, and nesting seagulls. The wetland is host to a diverse community of birds, waterfowl, and other wildlife. Eagles frequently hunt in the area and nest nearby. A seagull rookery is located on one of the grass islands. Juvenile salmonids migrating out of the Skagit River system also utilize the wetland's rich habitat. Aquatic plants also grow throughout the wetland. The wetland system itself also serves important water quality and hydrologic functions. The landscape is of high scenic value due to the water resources present. McGlinn Island has been set aside as open space for waterfowl and Tribal community uses.

8) Swinomish Channel.

i. Approximate Division of Ownership on the Reservation.

About two-fifths of the uplands bordering the Swinomish Channel is in tribal trust, another two-fifths is in individual trust and about 1/5 is on fee land but over half of this fee land is Tribally-owned.

ii. Description.

The Reservation uplands bordering the Swinomish Channel comprise approximately 8.4 miles of shoreline, extending from Padilla Bay to Hole

In The Wall at the southern tip of the Reservation. At treaty time, the Swinomish Channel was a shallow estuarine tidal channel system and distributary for the Skagit River. The Army Corps of Engineers has been dredging and maintaining the channel as a navigable waterway since the beginning of the 20th century. The dredged channel extends across mudflats and sea grass meadows in Padilla and Skagit bays. Dredge spoils deposited on the shores of the channel have replaced the mud flats of the original system with salt marshes and sandy beaches. The majority of the channel banks are armored. Though Skagit River water still enters and influences the hydrology and chemistry of the channel, the greater part of Skagit River flow has been deflected into Skagit Bay by a constructed jetty (Borland, 1976; Yates, 2001). Combined tidal and riverine processes in the channel result in a northerly net flow averaging 1.5 to 1.7 feet per second at peak tides (Rensel and Miller, 1985).

A remnant channel island/sand bar has been augmented with dredge spoils to form a shrub-vegetated causeway connecting McGlinn Island to the Skagit flats. Bulkheaded dikes are constructed in the agricultural lands in the north to keep tidewaters out. Numerous seeps and springs feed a network of wetlands at the toe of the bluff along the west side of the agricultural lands. In the northern agricultural lands, surface runoff is collected in remnant sloughs and agricultural ditches and carried to the channel.

iii. Water Quality.

Ambient water quality monitoring of the Swinomish Channel has been conducted at Kwonesum, a residential development, at the opening of the north agricultural slough, at Shelter Bay Marina, and at the Swinomish fishing docks. Water quality within Swinomish Channel is generally acceptable and within proposed Tribal Water Quality Standards. Low level, episodic fecal coliform bacteria contamination was found in the Swinomish Channel from Shelter Bay to Kwonesum and may pose a human health risk to swimmers making use of the Swinomish docks. Intermittent high turbidity may impact aquatic life, including salmon and shellfish in the channel.

The Swinomish Channel is at risk of water quality contamination from several on-Reservation point and non-point sources. The Shelter Bay sewage treatment plant outfall introduces bacteriological contamination, nutrients, and chloride and other inorganic chemicals. Fecal coliform exceedences may also be attributed, at least in part, to non-point source bacteriological contamination from the septic field at Kwonesum (a residential development) and storm-water runoff from hobby farms and high-density areas. Runoff from the log yard may cause nutrient loading

and contamination from chemicals used to treat the logs. Runoff from lawns, gardens, and agricultural lands may introduce nutrients and inorganic chemicals from herbicides, pesticides, and fertilizers. Air-borne and water-borne chemicals from the boat yard may also enter the channel in spite of the water collection and treatment system in place. Runoff from a dense network of roads and high traffic volumes in the area along with boat traffic on the channel may result in high hydrocarbon concentration in the channel. Also, on-reservation logging, construction, and agricultural practices may contribute to high turbidity.

Off-Reservation use of the Swinomish Channel includes the LaConner Regional Sewer Treatment Plant outfall and the LaConner Marina, which are located directly opposite the Swinomish Village.

iv. Tribal Water Resource Value.

Historically, the Tribe used the Swinomish Channel for catching salmon using specially designed family traps placed along the Channel (Tribal informant, 2004). The Swinomish Channel has been a primary migration route for salmonids (Borland, 1976). When the Army Corps of Engineers began dredging the channel at the beginning of the 20th century, the Corps not only made the channel more deep and narrow, but also dumped the dredge spoils on the Reservation side, effectively destroying much of the shellfish habitat in the process. The channeled wetlands along the shore, though heavily altered, provide important habitat for juvenile salmonids. Harvestable oyster beds have seeded within the rip-rap along the north Channel.

Tribal Community members use the Channel for fishing, swimming, crabbing, hunting, boat moorage, and navigation. Swinomish Channel waters are also utilized to dilute effluent from several point source discharges. The sewage treatment plant outfall for Shelter Bay has been emptied into the Channel, and storm-water drains for Swinomish Village and Shelter Bay, and storm-water drains for the Skagit Bay Boatyard, Dunlap Log Yard, and Tribal Fish Plant empty into the Swinomish Channel.

The low level, episodic fecal coliform bacteria contamination mentioned in the water quality section may pose a human health risk to swimmers making use of the Swinomish docks. However, net north flow in the channel and excellent water quality with respect to bacteria in east Skagit Bay indicate that the bacteria pollution is not impacting potential shellfish growing areas in Skagit Bay.

Tribal Community members also frequently hunt in this area. The lowlands along the north part of the channel are home to numerous

migrating birds and waterfowl following the Pacific Flyway. Extensive networks of wetlands in the lowlands off the shore provide shelter and food for the birds.

In the future, the Tribe may expand fisheries operations on the channel, construct a public marina proposed at the north end of the channel, and increase density within the village and Shelter Bay.

v. Environmental Sensitivity.

These waters are environmentally sensitive due to the abundant wildlife and aquatic life that rely on this habitat for feeding and refuge. Eagles and herons and other waterfowl frequent the shallow waters of these bays to feed and seek refuge, as do harbor seals and fish. Sea otters, seals, peregrine falcons, cormorants, kingfishers and other wildlife also make use of the area. The salt marshes provide important habitat for juvenile salmonids. These wetlands also serve to improve water quality. The shorelines of the Swinomish Channel have been designated as shorelines of statewide significance by the State of Washington.

9) Munks Creek.

i. Approximate division of ownership on the Reservation.

The majority of Munks Creek flows through individual trust land, with only approximately one-eighth of the stream in the upper reach, near the head waters, flowing through fee land.

ii. Description.

Munks Creek sub-basin drains an area of approximately 303 acres. Numerous seeps and gullies along the east slope of the Reservation drain into a narrow bog that feeds Munks Creek. The creek channel widens into a second small wetland approximately 600 feet from its headwaters and then continues for another 2800 feet before entering the Swinomish Channel. The creek carves a steep-sided gorge through mixed conifer and deciduous forest. Historically, stream flow within the upper reach just above Reservation Road was substantial enough to fill a ceremonial bathing tub. In recent years, flow in the upper reach of the creek has decreased to almost nothing during the summer. The stream and wetland system of Munks Creek and the adjacent dense forests are home to many aquatic and wildlife species including deer, otter, herons, and other birds. Munks Creek enters the Swinomish Channel on a relatively isolated and undisturbed stretch of beach that is home to river otters and other wildlife. The area is also frequented by great blue herons that nest nearby.

iii. Water Quality.

Munks Creek is monitored near the mouth of the creek, where it enters the Swinomish Channel above the area of tidal influence. Low in-stream flows and non-point source pollution within the watershed are negatively impacting the creek. Some bacterial contamination has been noted during ambient monitoring in the past but it appears to be improving. The creek has very low summer flows and low year-round flows. Low flows can result in fine substrate sediments settling into interstitial spaces between gravels, impacting macroinvertebrate organisms and potential spawning habitat. Additionally, low flows create geomorphic conditions that can result in the evolution of low habitat complexity, which limits biotic diversity. Low flows also create shallow conditions that result in marginally high temperatures and associated low dissolved oxygen that can kill fish and other aquatic life. Anecdotal evidence and limited scientific evidence suggest that low creek flows are a recent development.

Overall, current and historic water quality data indicate that Munks Creek meets proposed water quality standards for conventional parameters except for low pH. A bog wetland may be the cause of the low pH found in the stream reach between the headwaters wetland and the lower wetland.

Existing potential pollution sources within the sub-basin include runoff from Reservation Road, which may introduce hydrocarbon contamination to the stream, and forest practices, which may increase turbidity, increase temperature, decrease dissolved oxygen, and increase nutrient loading. Though the Kwonesum development is located outside the surface watershed sub-basin, drawdown at the Kwonesum community well may impact base flow contribution to in-stream flows in Munks Creek, which is vital to salmon and other aquatic life.

iv. Tribal Water Resource Use.

Historically, this creek has been an important place to the Swinomish people for cultural and spiritual practices. The Tribal Community did use Munks Creek up until fairly recently for spiritual and cultural purposes, including spiritual bathing, but has since discontinued using this area for traditional reasons (Tribal informant, 2004). Some now abandoned homes along the creek pulled drinking water from the creek. Munks Creek has historically been an anadromous fish-bearing stream. The creek was also once used for an old fish hatchery that raised chum salmon and has been designated appropriate for possible remote site egg incubator development for fisheries enhancement in the future.

v. Environmental Sensitivity.

Munks Creek is an important and sensitive cultural and spiritual resource. The creek also provides important habitat for aquatic life and wildlife, including river otters and deer. This creek has the potential, through enhancement efforts, to be a productive, fish-bearing water resource.

10) Fornsby Creek.

i. Approximate division of ownership on the Reservation.

Fornsby Creek begins in fee land and continues on for about 3/5 the length of the stream, runs through tribally owned fee land, and finally ends in individual trust land that adjoins the Swinomish Channel.

ii. Description.

The Fornsby Creek sub-basin drains an area of approximately 252 acres. Fornsby Creek arises from numerous seeps and small wet depressions along the hilltop and east slope of the Reservation above the south end of the agricultural lands. The upper reach of the creek flows in a steep-sided gorge through mixed conifer and deciduous forest from the hill top east approximately 2700 feet. The lower reach of the creek flows an additional 5200 feet into the Swinomish Channel.

Stream banks are mucky clay with a thick layer of organic debris under canopied banks in the upper reach. When Fornsby Creek enters the agricultural flat lands, the stream channel is confined to diked agricultural ditches until it reaches the Swinomish Channel. The stream gradient through the agricultural lands is nearly flat. Two or more agricultural ditches or remnant sloughs discharge to the lower reach of the creek. Since this waterbody is at sea level, a tide gate at the mouth of the creek prevents tidal inundation. The upper reach of Fornsby Creek and the adjacent forest is habitat to numerous aquatic and wildlife species. The lower reach of the creek supports Sticklebacks and other tolerant aquatic species. The area is also frequented by great blue herons that nest nearby.

iii. Water Quality.

Since 1997, Fornsby Creek has been monitored at the Cornwall family farm, located at the base of the bluff where the creek changes gradient and flows across the flats into the Swinomish Channel. The creek is now monitored extensively at the lower reach as well. Overall water quality in Fornsby Creek is good, however low in-stream flows and non-point source

pollution within the watershed are negatively impacting the creek. Several of the conventional parameters measured occasionally exceed proposed Tribal water quality standards. Temperatures are occasionally high and dissolved oxygen may be low during the summer months. Turbidity has been greater than expected 50% of the time. Fecal coliform was also occasionally high. Fornsby Creek is a drinking water source for one household.

The creek is impaired due to very low summer flows and low year-round flows. Low flows can result in fine substrate sediments settling into interstitial spaces between gravels, impacting macroinvertebrate organisms and potential spawning habitat. Additionally, low flows create geomorphic conditions that can result in the evolution of low habitat complexity, which limits biotic diversity. Low flows also create shallow conditions that result in marginally high temperatures and associated low dissolved oxygen that can kill fish and other aquatic life. Anecdotal evidence and limited scientific evidence suggest that low creek flows are a recent development.

Very little current or historic non-point pollution data exist for Fornsby Creek. Recent water quality monitoring has identified high turbidity, low dissolved oxygen concentrations, and moderately high fecal coliform concentrations in the upper reach of Fornsby Creek relative to proposed water quality standards. Potential sources of pollution in the upper reach include failing residential septic systems, logging practices, residential gardening and yard care, and construction activities. Water quality impacts along the lower reach are expected to be severe. This is a target area for future monitoring and restoration because it harbors important off-channel habitat for rearing and migrating salmon.

Current potential sources of pollution within the lower reach are related to agricultural practices which may contribute nutrients, pesticides, herbicides, nuisance algal growth due to nutrient loading, temperature degradation due to lack of riparian cover, low dissolved oxygen concentration due to high temperatures, and sediment loading. Fee lands within this sub-basin also overlie the recharge zone for groundwater aquifers.

iv. Tribal Water Resource Uses.

Currently, Fornsby Creek is the primary source of drinking water for one household within the sub-basin. The creek is also used by fish and wildlife and may provide for fisheries enhancement in the future.

v. Environmental Sensitive Areas.

The creek also provides important habitat for aquatic life and wildlife, including river otters and deer. This creek has the potential, through enhancement efforts to return to a productive, fish-bearing water resource.

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D) The Values of the Water Bodies to the Tribe.

Each waterbody has a unique combination of cultural, economic, and environmental value that affects its priority to the Tribal Community.

Cultural value is assessed based on five selection factors. Watersheds that are currently, or were historically, used for spiritual or ceremonial purposes received two points. Watersheds that support recreational uses received one point for secondary contact recreational activities (boating, wading, etc.) or two points for primary contract activities (swimming, other full-immersion activities). Watersheds that support traditional harvest resources received one point each for significant terrestrial resources and/or significant aquatic resources. Watersheds with culturally significant species were given two points. Finally, watersheds containing known or potential archeological or historic sites received two points. No attempt was made to scale these scores to reflect frequency or importance of utilization or quantity or quality of resources. As such, the assessment is a crude measure of cultural significance and may benefit from refinement as additional assessment tools become available.

Economic value is determined based on five major economic uses of shellfish or fish (including whether the water source is used for fishing or shellfishing) logging, or agriculture, whether it has development potential, or is utilized for tribal economic benefit.

Environmental value was evaluated using three criteria. Two points were given for watersheds with a known presence of sensitive species, including species listed as endangered or threatened or proposed for listing. Watersheds received up to two points if a significant part of the upland watershed was relatively undisturbed. Finally, two points were given to each watershed or sub-watershed containing critical areas, including groundwater recharge and aquifer protection areas, geologic hazard areas, critical habitat, streams, creeks, springs, riparian areas, and wetlands.

Prioritization matrix for Swinomish Indian Reservation watersheds and sub-watersheds. Assesses priority based on cultural, economic, and environmental value of each basin as well as relative impairment of aquatic systems quality.
Input for map garnered from scoping meeting with Tribal members.

Criteria	Selection Factor	Padilla Bay	Similk and Turner's Bay	Kiket Bay	Lone Tree Creek	Skagit Bay	Snee-Oosh Creek	Skagit River Delta	Swinomish Channel	Munks Creek	Fornsby Creek
Cultural value (max 2 pts. ea.)	Spiritual or ceremonial utilization		2	2	2			2		2	
	Recreational utilization	1	1	1		2		2	2	2	
	Presence of traditional harvest resources	2	2	2	1	2	1	2	2	1	1
	Presence of culturally significant species	2	2	2	2	2	2	2	2	2	2
	Presence of known or potential archaeological or historic sites		2	2		2	2		2	2	2
Economic value (max 2 pts. ea.)	Shellfish/fishing	2	2	2		2			2		
	Logging		2	2	2	2	2		2	2	2
	Agriculture								2		
	Development potential	2	1	1	1	2	2		2	1	2
	Tribal economic	2		2	2				2		
Environmental value (max 2 pts. ea.)	Known presence of sensitive species	2	2	2		2		2	2		
	Relatively undisturbed upland		2	2	2		2	2	1	2	2
	Presence of critical areas subject to disturbance	2	2	2	2	2	2	2	2	2	2
VALUE SCORE		*15*	*20*	*22*	*14*	*18*	*13*	*14*	*23*	*16*	*13*
VALUE-BASED PRIORITY RANK		*6*	*3*	*2*	*7*	*4*	*9*	*7*	*1*	*5*	*9*
Environmental condition	Water quality (see Table 6, selection factor 1)	1	2		1		1	1	1	1	1
	Water quantity (max 1 pt.)				1		1			1	1
	Habitat (see Table 6, selection factors 2 and 3)		1	1	1	1			1		1
	Biologic resources (see Table 6, selection factor 4)	1	1	1		1		1	1		
IMPAIRMENT SCORE		*2*	*4*	*2*	*3*	*2*	*2*	*2*	*3*	*2*	*3*
IMPAIRMENT-BASED PRIORITY RANK		*5*	*1*	*5*	*2*	*5*	*5*	*5*	*2*	*5*	*2*
OVERALL SCORE		**17**	**24**	**24**	**17**	**20**	**15**	**16**	**26**	**18**	**16**
RESTORATION PRIORITY RANK		**6**	**2**	**2**	**6**	**4**	**10**	**8**	**1**	**5**	**8**

5. The Tribe Has the Capability Required to Administer an Effective Water Quality Program.

A. The Tribe Has Extensive Previous Management Experience.

The SITC has a long and distinguished record of administering federal and tribal programs and obtaining federal grants to protect and improve the health and welfare of tribal members and the environment of the Reservation. The SITC has a water quality program, public health programs, an air quality program, and a noxious weed control program. Additionally, the Tribe has successfully cleaned up a number of hazardous waste sites on the Reservation. For instance, in November 2002, cleanup of the PM Northwest site was officially completed. In the 1960s, the site had been used to store chemical waste from refineries in four disposal ponds. The waste site had been identified as a threat to the reservation aquifer. Fifty-eight thousand tons of chemicals were removed at a cost of over $4 million pursuant to the EPA's administrative order on consent. SITC provided oversight for the project.

SITC enforces a tribal environmental policy act, an air quality act, a shoreline management act, and a land clearing act. *See* Tribal Environmental Policy Act, Air Quality Act, Shorelines and Sensitive Areas Ordinance, and Land Clearing Act, attached asExhibits 19, 20, 21 and 22. The Tribe recently was granted TAS under Section 105 of the Clean Air Act, 42 USC § 740, to develop and implement an air pollution control program. The Tribe is in the process of promulgating a number of additional environmental ordinances, including a Hazardous Substances Ordinance.

As described in detail below, the Swinomish Water Resources Program employs four fulltime employees and four part-time employees. The Water Resources Program has completed various mapping and modeling projects for both groundwater and surface water on the Reservation. In addition, the program engages in monitoring of water quality and stream flows, as well as performing other functions, such as assessing wetlands and conducting amphibian surveys. In addition to developing water quality standards, the Water Resources Program is also currently drafting an aquifer and groundwater protection ordinance and a marine sediment quality ordinance.

The SITC administers a public health program for the SITC and three other area Tribes. The program is funded by the U.S. Indian Health Service, Northwest Washington Service Unit. The service unit sanitarian inspects septic systems for tribal members who are not on the tribal sewage system and provides instruction on sanitation and regulatory oversight for food establishments and food prepared for public gatherings.

The SITC manages a noxious weed control program using integrated pest management techniques. Annually, volunteers and members of the natural resources crew remove approximately 100 tons of a noxious weed called spartina from tribal tidelands.

The Tribe's environmental and public health programs are described in detail

below:

B) Listing of Existing Tribal Environmental and Public Health Programs.

1) Comprehensive Land Use Plan.

The 1996 Swinomish Comprehensive Plan ("Plan") is the culmination of an award winning joint planning effort by the Swinomish Community and Skagit County Planning Department resulting from a Memorandum of Understanding ("Planning MOU") signed in March of 1998. *See* Memorandum of Understanding for Establishing Procedures for the Administration of a Cooperative Land Use Planning Program Between the Swinomish Tribal Community and Skagit County, attached as Exhibit 23. The cooperative land use planning largely resolves land use conflicts with the County for lands within the exterior boundaries of the Swinomish Indian Reservation, as set aside by Executive Order in 1873.

The Plan describes Tribal goals and policies directed at guiding and regulating land uses while preserving and protecting the natural environment and Tribal cultural values. The Plan seeks to identify and restrict population growth levels for the Reservation, and provide suitable land supply to meet these determined growth levels. The Plan assures the protection of identified environmental, cultural, and natural resources from adverse urbanization. Underlying and directing the Plan is the Tribe's unique heritage, sovereignty and commitment to preserving its environmental and cultural heritage. *See* Swinomish Comprehensive Plan, attached as Exhibit 24, to review the designated land use classifications.

2) Drinking Water Quality Protection Program.

The Tribe has delineated a wellhead protection area around three wells supplying drinking water to Tribal and non-Tribal residences, commercial enterprises, and administrative buildings. This is the largest public water supply system on the Reservation, servicing approximately 1,000 residential, commercial and industrial consumers.

3) Non-Point Source Pollution Program.

The Tribe has taken the lead in three programs to address non-point source pollution affecting Reservation waters. These are described below.

4) Wastewater Facilities Planning.

Wastewater facilities planning by the Tribe resulted in the construction of sewer trunk line and service to over 200 homes previously served by outdated septic systems and a failing primary treatment system. The improvements, in

conjunction with improved on-site wastewater disposal regulations, are intended to eliminate much of the bacterial pollution affecting northern Skagit Bay.

5) Regional Monitoring.

The Tribe is a member of the Skagit River System Cooperative, ("SRSC"), a two-Tribe fisheries management organization, that has been in operation for nearly thirty years.[9] The Cooperative gathers and catalogs land use, topography, and non-point pollution data within the Skagit River Basin as part of its overall fisheries evaluation. It also plans, engineers, implements, and monitors a range of habitat restoration projects.

C) Regional Implementation Plans:

1) *Fecal Coloform Contamination.* The Tribe, SRSC, State and County Departments of Health, and State Department of Ecology are working together to identify fecal contamination sources that violate state water quality standards in Turner's Bay and restrict shellfish harvesting in these waters.

2) *Noxious Weeds.* The Tribe and Skagit County's Noxious Weed Office are working cooperatively to control Spartina species in the Skagit Basin.

3) *Emergency Response Program.* A cooperative agreement is being developed with Skagit County's Emergency Response Committee. The agreement provides for an effective and cost efficient response capability from diverse technical sources to protect the health, welfare and safety of the Reservation residents and environment.

4) *Airshed Quality.* The Tribe and NWAPA (Northwest Air Pollution Authority) entered in an agreement for cooperative planning of airshed quality in 1996.

5) *Coordinated Water Supply System Plan.* The Coordinated Water Supply System Plan provides for cooperation in public water supply delivery and recognizes the Tribe's authority for all Reservation lands.

6) *Wastewater Treatment & Water Supply.* Wastewater treatment and water supply agreements with the City of Anacortes and the Town of La Conner establish physical connections of regional utility systems.The Utility Authority's primary source of water is the City of Anacortes, from whom it purchases water based on a contractual relationship. The Tribe also has back-up wells to utilize if there is ever a problem obtaining water from

[9] SRSC was formerly a three-tribe cooperative called Skagit System Cooperative, or SSC. SSC was founded in 1976. Its named was changed in 2004.

Anacortes. The Authority also has a sewer intertie with the Town of La Conner, and obtains use of the Town's system through a contractual relationship.

7) *National Pollution Discharge Elimination Systems ("NPDES") Joint Permitting Program.* A tri-party agreement for the administration of the federal NPDES permitting program joins the technical capacity of the state agency with the jurisdictional authority of the Tribal and federal governments.

D) Description of the Entities Which Exercise the Executive, Legislative, and Judicial Functions of Tribal Government.

As mandated by Article III of the Tribe's Constitution, the Tribe is governed by an eleven-member tribal Senate, which has delegated authority from the General Council. The Senate elects, from within its membership, a Chairman and a Vice-Chair. The Senate also elects a Secretary and a Treasurer, who may, but need not be, tribal senators. More detail about the Tribal Senate and the form of government is included in Part II.B.1 and 2. The Senate governs by passing resolutions and promulgating tribal ordinances. The Senate also exercises taxing authority. While the Senate technically makes decisions by majority vote, the vast majority of its decisions are unanimous.

The Tribe's Chairman, Brian Cladoosby, has served as Tribal Chairman for eight years and as a Senator for over twenty years. He has been President of the Association of Washington Tribes for six years. Additionally, he served for two years as Assistant General Manager for the Tribe. The Vice-Chair, Barbara James, has been a Senator for twelve years, and the Secretary, Lydia Charles, has been a Senator for twenty-two years. The Treasurer, Dianne Edwards, has served on the Senate for nine years and two other Senators have served for over fifteen years.

The Senate delegates limited authority to various committees, which are comprised of tribal senators or senators and tribal members, and which are assisted by staff. Committees include (1) Enrollment Committee; (2) Elder Protection Committee; (3) Budget Committee; (4) Buildings/Facilities Committee; (5) Casino Business Committee; (6) Personnel Committee; (7) Fish & Game Committee; (8) Veteran's Cemetery Committee; (9) Housing/Education/Social Services Committee; (10) TERO Committee; (11) Fireworks Committee (12) Gʷ dᶻadad Committee (which addresses archaeological and cultural concerns).

In conducting the day-to-day tribal government, the Senate is assisted by numerous tribal departments, as described below:

1) Swinomish Housing and Utility Authorities.

Swinomish Utility Authority. An independent agency of Tribal government

established in 1989, the Utility Authority is responsible for the safe, cost-effective, and self-sufficient operation and management of drinking water, wastewater, and solid waste utilities on the Reservation. The Swinomish Utility Authority employs three people full-time and one person part-time. Director John Petrich has over 15 years experience overseeing the Department. He is certified by the State Department of Health as Water Distribution Manager III. Field Superintendent Tim White has twelve years of experience and is also certified by the State Department of Health as a Water Distribution Manager III. Warren James has thirteen years of experience and certified as a Water Distribution Specialist. The Authority provides water and/or sewer service to over 300 customers, both tribal members and non-members,[10] and its services include over 350 water service connections and 300 sewer service connections. The Authority pumps approximately 30 million gallons per year each of water and sewer through its system. Its annual operating budget is over $350,000. In addition, the Authority manages $1.5 million in debt services for Reservation Utility Improvement Assessments.

In addition to its primary water and sewer systems, the Authority manages two satellite systems, one of which provides water service for up to seven connections and the other of which provides water and sewer service for up to twenty-four connections. Additionally, the Authority provides emergency water service to a large residential, non-member community on the reservation, which is organized under tribal law as a reservation sewer district and is governed by a private homeowners' association.

The Utility Authority has had considerable success in serving and regulating non-members. For instance, in 1993, the Authority took over management of water services for a non-member residential development that had previously operated on a private well system. *See* Agreement for Transfer of Water System and Release, attached as Exhibit 25. With federal assistance, the Tribe constructed a water delivery system that served most of the southwest portion of the Reservation. The Tribe's Utility Authority initially served the private development by master meter, while the homeowners association operated and maintained the system including individual water meters and the monthly collection and payment of the master bill for water services. However, after community members became familiar and more comfortable with tribal operation of the larger system, the Tribe's Utility Authority accepted the community's request to assume full responsibility for the operation, maintenance and billing of all aspects of water service. By agreement, the local homeowners association conveyed ownership of the water lines and granted an access easement to maintain and repair the water lines within the development to the Tribe. *Id.*

The Utility Authority received a ranking of 89 out of 100 in 2005 from the Indian

[10] Roughly half of the water and sewer connections serve non-members.

Health Service, Indian Health Service Rating, attached as Exhibit 26, and it meets all applicable Safe Drinking Water Act standards.

Swinomish Housing Authority. The Swinomish Housing Authority was formed by Tribal ordinance in 1964. The Housing Authority administers tribal rental properties (the vast majority of which are leased to tribal members), and several other programs including conversion of rental homes to homes for homebuyer-eligible families. When necessary, the Housing Authority enforces the provisions of its leases and its laws and policies against tenants, including non-members, who do not comply with their obligations. For example, the Housing Authority recently successfully sought eviction of a non-member in tribal court, based on non-payment of rent, and the eviction was affirmed on appeal.[11] *See* Court Orders, attached as Exhibit 27. The Housing Authority also works with the Tribal Administration and Planning Departments to plan residential development and address the needs of fire protection, animal control, and development of Tribal Codes relating to housing needs of the community.

2) Swinomish Tribal Court.

The Swinomish Tribal Court is similar to other courts of general jurisdiction within the State of Washington. In criminal cases, the prosecutor presents evidence of a defendant's guilt and a tribal advocate assists in the defense. The rules of evidence and burdens of proof are similar to those in the state and federal court systems. Adult defendants have the right to a jury trial in criminal matters. The court also hears civil cases, including traffic infractions, dissolutions of marriage, evictions, and child welfare matters, among others. In addition, the Court operates a juvenile Healing-to-Wellness Court. During the year 2003, 533 actions were filed in Swinomish Tribal Court, which resulted in over 3,000 scheduled hearings.

The Court is staffed by a full-time tribal judge, the Honorable Mark Pouley. Prior to being appointed judge in 2004, Judge Pouley worked for twelve years at Cole & Cole, a private law firm. As a partner at Cole & Cole, Judge Pouley's responsibilities included litigation and appeal of real estate, business, domestic, criminal, and personal injury matters. For seven years, Judge Pouley has also served as a *pro tem* judge for Lummi Tribal Court, and, from 2002 to 2003, Judge Pouley worked with two other lawyers in conducting a comprehensive overhaul of the Swinomish Tribal Code. Judge Pouley graduated magna cum laude from Thomas M. Cooley School of Law.

Other court staff includes Cameron Fraser, who serves as tribal prosecutor. Ms. Fraser graduated from University of Michigan School of Law. Prior to becoming prosecutor, Ms. Fraser worked with Judge Pouley in conducting an overhaul of

[11] The parties settled the dispute subsequent to the appeal.

the Swinomish Tribal Code. Ms. Fraser also has experience serving as a law clerk to a state trial judge, providing legal advice to Alaska Native Corporations on behalf of a non-profit, and working as an instructor at the University of Alaska.

As tribal advocate, Carol Cornwall-Edson represents criminal defendants in tribal court. She has over fifteen years of experience working as a prosecutor and criminal defense attorney in Washington and Texas. Ms. Cornwall-Edson graduated from University of Texas School of Law.

Ms. Patricia Lujan serves as the Tribal Probation Officer. Prior to joining the court staff in 2004, Ms. Lujan worked for Skagit County Juvenile Probation and Detention Department for twelve years, first as a Corrections Officer and then as a Detention Supervisor. Ms. Lujan has an Associate Degree in Criminal Justice.

Other court staff include a court clerk and a youth compliance officer.

3) The Office of Planning and Community Development.

The Swinomish Office of Planning and Community Development's ("Planning Department") mission is to promote sustainable community development and ecological functions, and to expand the Tribe's capacity to exercise its sovereign rights, through planning, analysis, education, and implementation. The staff of nearly 20 is supervised by **Charles O'Hara**. Mr. O'Hara holds a Masters Degree in Public Administration from the Kennedy School of Government at Harvard University. He has over 25 years experience in the field, including five plus years serving as Planning Director at Swinomish and over ten years as Planning Director for the White Mountain Apache Tribe in Arizona. The Planning Department is organized into the following teams to better address the complex issues within the department's purview:

The *Environmental Compliance and Management Team* reviews and inspects activities occurring on the Reservation to assure compliance with the Tribe's environmental Ordinances and Regulations. The noxious weed program is also adminstered by this team. The noxious weed program monitors the Reservation for the presence of noxious weeds and works to actively remove these weeds including the tideland saltgrass weed, Spartina.

Environmental Science (Water Resources Program) monitors the Reservation environment to ensure that human activities do not harm the environment and that the environment is safe and healthy for people to inhabit and enjoy. This monitoring information is used to assess and develop new environmental policy and Tribal ordinances to ensure continued use and occupancy of the Reservation by the Swinomish Community. More detailed information about Water Resources staff and capabilities is provided below, under Part II.D.5.

Tribal Realty Team offers services to Indian trust land owners including: Acquisition & Disposal of Trust Lands (buying and selling property); General Leasing (agricultural; home site and residential); Partitioning (division of large parcels); Gift Deed (transferring land to relatives); Rights-of-Way; Appraisals and requests for updated Title Status Reports. The Tribal Realty works closely with the Bureau of Indian Affairs to obtain relevant information.

The mission of the *Administrative & Technical Support Team* is to ensure the efficiency of the Planning Staff as a whole, by providing administrative and technical assistance to staff in a positive and supportive manner. Our team will strive to establish, maintain, and foster positive and harmonious working relationships with those contacted in the course of work. We will support a dynamic, growth-oriented environment that promotes teamwork, develops efficient management strategies and provides a healthy work environment through cultural sharing, leadership development and team building.

As part of the *Administration & Technical Support Team*, Geographic Information Services provides accurate information, assistance, and support, and maintains and creates information to aid in the development of maps and data analysis to support the Planning Department as well as other tribal departments, as needed. The GIS program maintains a large database of layers, including (but not limited to) zoning, parcels, buildings, roads, realty information, water/sewer lines, vegetation, natural and cultural resources, and digital photos. These data layers, covering the Swinomish Indian Reservation and surrounding areas, are continually expanded and updated to aid in the development of maps and data analysis to support Departmental activities and issues.

Economic & Community Development Team. The mission of the Economic & Community Development Program is to enhance the Swinomish Indian Tribal Community's quality of life by creating a positive business climate that leads to job creation and the retention and enhancement of existing businesses. The Economic & Community development Team works with the Swinomish Development Authority (SDA), the economic development branch of the Swinomish Indian Tribal Government. to accomplish this goal.

The *Permit Team* is made up of members of the other five teams. The Permit Team administers the Building permit program. The Building program oversees the permitting and inspecting of land use activities including: Building & Mechanical/Plumbing; Demolition Lot Line Adjustment; Zoning & Zoning Variance; Planned Developments & Subdivisions; Tribal Environmental Protection Act; Shoreline and Critical Areas; Burning; On Site Septic; Storm Water Management; and Water Resources Protection.

4) Office of Tribal Attorney.

Four full-time tribal attorneys and a fifth attorney who serves as both tribal prosecutor and a part-time tribal attorney provide direct legal support to the Tribe and Planning Staff. Additionally, the Tribe's General Manager is also an attorney and formerly served as the Tribe's Chief Legal Counsel. Two part-time and one full-time paralegal provide support for the attorneys in the Office.

Alix Foster, Director of the Office of Tribal Attorney, holds a Juris Doctor degree from New York University School of Law and a Master of Laws in Law and Marine Affairs from the University of Washington. She holds a Bachelor of Arts in Government from Barnard College. Ms. Foster is licensed to practice law in Washington, the United States District Court for the Western District of Washington, the United States Court of Appeals for the Ninth Circuit, and the United States Supreme Court. Ms. Foster has over thirty years of experience practicing law, including serving as Acting Director for the Public Services Program at the University of Washington School of Law, working as a sole practitioner on criminal defense cases, serving as a public defender at the federal and county levels, and working as a legal aid attorney. She has been working for the Tribe for ten years and specializes in environmental and natural resources law as well as issues involving the Tribe's treaty rights.

Ann E. Tweedy, tribal attorney, has a Juris Doctor degree from University of California, Berkeley School of Law (Boalt Hall), where she received a Jurisprudence Award in Indian Law and earned second place in the *American Indian Law Review*'s annual writing competition. She holds a Bachelor of Arts in English and Philosophy from Bryn Mawr College. In addition to her four years of experience working for the Tribe, she has three years of experience clerking for state and federal appellate judges, most recently for the Honorable Ronald M. Gould on the United States Court of Appeals for the Ninth Circuit. Her work focuses on natural resource issues, environmental law, and treaty rights. Ms. Tweedy is admitted to the bar in Washington, California,[12] the Swinomish Tribal Court, and the United States District Court for the Western District of Washington. Her article on tribal civil regulatory jurisdiction under the CWA after *United States v. Lara* was recently published in *Environmental Law*. Although Ms. Tweedy will be leaving SITC shortly to pursue another opportunity, she will be replaced by another well-qualified attorney.

Cameron Fraser serves as the tribal prosecutor and tribal attorney on social services issues. She has a Juris Doctor degree from University of Michigan. She holds a Bachelor of Science in Political Science with a Certificate in American Indian and Native Studies from the University of Iowa. Ms. Fraser has three years of experience working for the Tribe, initially as a reviser of the tribal code and subsequently in her current position. Prior to her service to the Tribe, she worked as an attorney for a non-profit that provides legal services to Alaska Native Corporations and as a law clerk to an Alaska trial judge. She also served

[12] Ms. Tweedy's status as a member of the California State Bar Association is currently inactive.

as an instructor for the University of Alaska on Indigenous Justice and Tribal Court. Ms. Fraser is admitted to the bar in Washington, Alaska, and Swinomish Tribal Court.

Stephen LeCuyer began working as a Tribal Attorney in December 2004. He has a Juris Doctor degree from the University of Michigan, and a Bachelor of Arts in English from Oberlin College. He began practicing law in 1980, working first for DNA-People's Legal Services in the Navajo Nation and then for 18 years as a partner in a two-person law firm with offices in the Navajo Nation and Albuquerque, New Mexico. His practice focused upon Indian law, employment, employment-related and employee benefit issues, torts and small business. The work often involved jurisdictional, sovereign immunity and choice of law issues in Arizona, New Mexico, and Navajo Nation courts.

James Jannetta, began working for the Tribe as a Tribal Attorney in January of 2005. He holds a Juris Doctor degree from the University of Minnesota Law School and a Bachelor of Arts degree from Macalester College in St. Paul Minnesota.

Mr. Jannetta has significant experience in the field of Indian Law. He has served as a Senior Staff Attorney and Deputy Director to the Sault Ste. Marie Tribe of Chippewa Indians, working on litigation matters for the Tribe concerning treaty rights, gaming and economic development, and commercial and financial transactions.

Prior to his work with the Sault Ste. Marie Tribe of Chippewa Indians, Mr. Jannetta served as General Counsel to the Lac du Flambeau Band of Lake Superior Chippewa Indians. His responsibilities included tribal court prosecution, advising of tribal departments and Tribal Council, economic development, code and ordinance development, tax and jurisdiction issues, treaty rights negotiations and litigation.

Mr. Jannetta's experience also includes work in his own private law firm, as the Director of Litigation for a legal services program in Wisconsin, and as a Staff Attorney for both the Office of the Solicitor in Washington D.C. and Upper Penninsula Legal Services in Michigan.

5) Tribal Police Department.

The Swinomish Police Department has several divisions, including Patrol, Investigations, Traffic, and Marine Patrol. The Department includes a Chief of Police, a Lieutenant, two Sergeants, and five Patrol Officers, as well as support staff. The department has hosted a Washington State Basic Police Academy and many reserve academies. The Swinomish Police Department received a national award for outstanding contributions towards its traffic safety programs.

The Swinomish Police Department is the primary responder to crimes and emergencies that occur on the Swinomish Reservation. Additionally, the Swinomish Police Department works closely with the neighboring town of La Conner and assists the Skagit County Sheriff's Department with search and rescues in surrounding waters and with incidents that occur adjacent the Swinomish Reservation. Department officers are commissioned by the Swinomish Tribe, the Bureau of Indian Affairs and the Skagit County Sheriff's Office to meet their obligations. The department also has mutual aid agreements with the surrounding towns Anacortes, Burlington, La Conner, Sedro-Woolley, Concrete, Coupeville and the Skagit County Drug Task Force.

The department's primary duties are to enforce the laws of the Swinomish Tribal Community. As with other jurisdictions, these laws are broken down into two categories, criminal and civil. When a civil law is broken, the violator does not risk going to jail. The usual punishment for civil infractions is a monetary fine. The Swinomish Police Department issues citations for civil infractions to members and non-members alike.

When a person is involved in an incident with criminal penalties, he or she will go through one of three court systems, Tribal, State or Federal. The Swinomish Tribe does not exercise criminal jurisdiction over those who are not considered Indian for the purposes of the Indian Civil Rights Act. Non-Indians who are arrested by Swinomish Police Officers are booked into Skagit County Jail, issued a citation to appear in Skagit County District Court, or referred to the Skagit County Prosecutor's office for charges in Skagit County Superior Court.

An agreement with the County Sheriff and local police departments, which cross-deputizes Tribal Police, gives Tribal Police enforcement authority over non-Indians on fee land and in jurisdictions adjacent to the Reservation. *See* Cooperative Law Enforcement Agreement Between the Swinomish Indian Tribal Community and Skagit County, attached as Exhibit 28.

6) Office of Social Services.

The Social Services Department of the Swinomish Indian Tribal Community provides a vast array of services to the Tribal Community, including senior programs, mental health programs, family services programs, childcare services, an alcohol and drug abuse treatment and prevention program, community services, education services and recreation. The Department is headed by Director, John Stephens.

Senior Services. The goals of the Tribal Seniors Program are to improve the nutritional status and social opportunities for members over the age 55. In 2004, Senior Services provided 4,014 meals including some 1,373 that were delivered to

members in their homes.

Mental Health. Counseling services are provided to individuals and groups in the community in a culturally relevant and confidential manner. Several male and female counselors are available on site from tribal and community mental health agencies.

Family Services. The Swinomish Family Services Program helps to protect children and elders, strengthen families, and generally serves as a positive resource for the community. The accomplishments of the Swinomish Family Services Program include successful collaboration with service providers and programs throughout Skagit County.

Daycare. The Daycare Center provides childcare services to any member of the community on a sliding fee scale, based upon income. Childcare program services are educationally focused with appropriate nutrition services provided. This vital service assures that parents, especially single parents, have support services available so that they can pursue training and employment opportunities.

Alcohol Program. The Swinomish Alcohol Program provides both treatment and prevention programs. The prevention Program includes an organized youth prevention group, weekly meetings and weekend activities. The treatment program includes two state certified counselors. A Youth Counselor provides chemical dependence assessments and referrals to appropriate inpatient and outpatient treatment services. The Youth Counselor also facilitates a prevention program in the LaConner High School on a weekly basis. An Adult Counselor provides referrals, assessments and individual counseling, while also serving as the Director of the Alcohol Program.

Community Services. The Social Services Department also provides a range of income-support activities such as commodity foods, Christmas food vouchers, child Christmas gift certificates, food baskets, BIA general assistance applications, and assistance in obtaining DSHS and Social Security benefits as well as Low Income Home Energy Assistance (LIHEAP).

Education Program. Education Programs are also provided by the Social Services Department, including GED / Adult Education, Job Training, Vocational Rehabilitation, Headstart, Pre-School, Birth-to-Six, Secondary Education Assistance, Life Skills, After School Tutoring, NW Indian College and a Library for educational and community use.

Recreation Program. The Recreation Program provides a number of programs and activities that serve the community and families throughout the year. Family activities include trips to the waterslides, annual events such as the Memorial Day Tournament, Easter egg hunt, Halloween party and Christmas program. The

program also provides sports camps, swimming lessons, gymnastics and skating for tribal youth. For adults, the program sponsored a men's softball team, a coed softball team and a men's basketball team.

7) Fisheries and Hunting and Wildlife.

The twenty-five-person staff is comprised of scientists, policy managers, and support staff.

Fisheries: Harvest Management. The Swinomish Fisheries Department works in close collaboration with The Skagit River System Cooperative ("SRSC"), an award-winning consortium of the Swinomish and Sauk-Suiattle tribes that has been in continuous operation since 1976. SRSC provides habitat protection and restoration, recovery planning and fish research services to the two Skagit River tribes. The Swinomish Fisheries Department provides fish and shellfish harvest management services to the Swinomish Tribal Community.

The Department provides technical assistance needed to manage salmon and bottom fish to achieve optimum harvests for the Swinomish Tribe. Both the Department and SRSC salmon recovery staff also spend considerable time addressing endangered species recovery, including a recent critical review of the Rule 4(d) Chinook Harvest Management Plan.

The purpose of the Shellfish Division is to provide technical assistance needed to manage and enhance the shellfish resources to achieve optimum benefits for the Skagit System tribes. Prior to each fishery, annual management plans are developed and negotiated with the State of Washington and affected tribes. Intertribal plans are also negotiated for the Central Sound geoduck fishery as well as for the Region One and Region Two crab fishery.

Hunting & Wildlife. The Swinomish Hunting and Wildlife program was developed to protect our Treaty hunting and gathering rights and to ensure that they are exercised within the parameters of our Treaty. Like fisheries, it is also our responsibility as co-managers to properly manage the resource with the state of Washington and other Tribes. This includes the development of management plans for hunted and non-hunted wildlife species. The Swinomish Tribe also participates in research projects such as population assessments of elk and mountain goat.

8) Enrollment.

Tribal enrollment is an important aspect of tribal sovereignty. By exercising the right to determine its membership, the Tribe assures the continuity and integrity

of the Swinomish Indian Tribal Community. Through enrollment, an individual obtains the rights and benefits of membership in the Tribe.

Enrollment matters are reviewed and decided upon by The Swinomish Tribal Enrollment Committee, which consists of eight members who are appointed by the Swinomish Indian Senate. The Enrollment Committee reviews each individual enrollment application file to determine tribal membership eligibility. In examining each application for tribal enrollment. the Enrollment Committee relies on the Swinomish Constitution and the Tribal Enrollment Ordinance.

As of November 2005, the Tribe's total enrollment is 789 members, 519 of whom are 21 years of age or over. A total of 1181 individuals are recorded on the enrollment database, including the Base Roll established in 1934. The Enrollment Office began issuing Tribal Enrollment Identification Cards for enrolled Tribal Members in March 2004.

9) Health Clinic.

With a staff of twenty, including a medical doctor, four nurse practitioners, two nurses, a social worker, a dietician, and several other key staff members, the Health Clinic provides medical services to the Swinomish and Upper Skagit Tribes. Its 5,900 square-foot clinic includes five exam rooms, one procedure room and support staff offices. A physician is available four days a week and a nurse practitioner is on staff five days a week. A registered nurse provides prenatal case management, and a weekly WIC nutrition clinic is also available. The Medical Clinic serves both direct and contract-eligible clients and can bill DSHS, Medicare or private insurance. The health clinic administers programs such as SIDS prevention, children's immunization focus, tobacco use prevention, diabetes program, and domestic violence prevention.

The Clinic also provides a Fitness Center, staffed with a full-time fitness coordinator. The Center was established to meet the needs of diabetic patients but is also open to the entire community. In addition to weight lifting equipment, the Fitness Center has six cardiovascular machines, two treadmills, two elliptical machines and to recumbent bicycles.

10) Dental Clinic.

With a staff of six, including one full-time dentist, a part-time dentist, a hygienist, two dental assistants and an office administrator, the Swinomish / Upper Skagit Dental Clinic provides a broad range of dental services including cleanings, check-ups, fillings, crowns, bridges and denture work. The clinic works with Bellingham Technical College to provide sealants to Native American Youth in the 1st, 2nd, 5th and 6th grades. The Clinic also provides fluoride treatments to children in the Swinomish daycare and Headstart programs.

11) Accounting.

The seven-person staff of the Accounting department is responsible for maintaining the Tribe's financial records in accordance with Generally Accepted Accounting Procedures and applicable Federal, State and Tribal regulations.

The Department also handles payroll administration for the Tribe and plays a key role in preparing financial reports, preparing Tribal Budgets and handling insurance and benefit needs for the Tribe and its employees. The Department is led by Chief Financial Officer Merril Burke, who has served in this position for seven years. Mr. Burke holds a Masters of Public Administration from the University of Texas, is a Certified Public Accountant, and has over twenty years experience in accounting, working for other tribes, public agencies, and private businesses.

12) Tribal Employment Rights Office.

Tribal Employment Rights Office (TERO) monitors and enforces the Swinomish tribal employment rights ordinance to ensure that tribal employment rights are protected. Enforcement of employment rights is funded through the Equal Employment Opportunity Commission.

TERO negotiates with contractors doing business on the Swinomish Reservation to create employment positions for tribal members and refers qualified applicants to fill those vacancies. Tribal members must file an application with relevant employment information and become part of the Tribe's job bank to be eligible for placement. TERO also investigates and mediates employment discrimination complaints.

The Western Washington Indian Employment Training Program (WWIETP) is another program operated by the TERO office. Through this program, job training assistance is offered to tribal members to gain sufficient employment skills to obtain permanent employment. Summer youth employment positions are also offered through the TERO office.

13) Public Works Department.

The Department has three divisions: Facilities; Special Projects; and Streets & Utilities. Each division has a division manager and several employees whose primary function is to work in that specific area, although each employee may be expected to work in other divisions as the workload shifts. Presently, the department is set-up with 6 full-time employees in the Facilities Division; 1 full-time employee in the Special Projects Division; and, 4 full-time employees in the Streets and Utilities Division.

Public Works Director, William Critz, P.E., joined the tribal staff as Public Works Director in 2005. Mr. Critz holds a Bachelor of Science Degree in Engineering, and has over thirty years of experience in municipal engineering. He has nearly twenty years of experience serving as Public Works Director for municipalities in Oregon and Washington. His work for the Tribe includes overseeing construction and maintenance projects, developing policies, and planning and executing both short- and long-range projects and programs.

The administrative functions are assigned to the Public Works Director, Assistant Public Works Director and to the Office Manager. Finally, the department has 3 part-time and 3 on-call employees who help out in the Facilities and Special Projects Divisions as needed.

The Facilities department is responsible for the day-to-day maintenance of Tribal governmental buildings, lawns, gardens, grounds, cemetery, docks and other common areas and facilities. The department currently employs five full-time and two part-time employees. The Facilities Department also handles a number of special projects each year such as installation of flooring, heating systems, and lighting and electrical access.

The Special Projects Division takes care of waste management functions (e.g. oil recycling, white goods disposal, etc.) as well as managing the Tribal noxious weed and pesticides programs, and others as assigned.

The Streets and Utilities Division is charged with operation and maintenance functions for the Tribal road system as well storm water management from those roads.

14) Other Key Staff Members:

i. *General Manager*. Allan Olson, the Tribe's General Manager, has worked for the Tribe for over twenty-five years. Prior to becoming General Manager, he served as the Tribe's Chief Legal Counsel. Mr. Olson oversees Tribes employees and staff and meets monthly with department directors.

ii. *Personnel Director.* Wayne Bill serves as the Tribe's Personnel Director, administering tribal policies and making recommendations to the General Manager and the Personnel Committee on policy changes and employment decisions. In addition to his extensive business and supervisory experience, Mr. Bill has eight years experience working as a Human Resource Analyst for another tribe.

iii. *Director of Intergovernmental Affairs/Economic Development Attorney.* Marty Loesch, works as the Director of Intergovernmental Affairs and provides legal assistance to support the Tribe's economic endeavors. Mr. Loesch has a Juris Doctor

degree, a Master of Laws in International Human Rights law, and a Master of Arts in International Peace Studies from University of Notre Dame. He has a Bachelor of Arts in Music and Liberal Studies also from the University of Notre Dame. Mr. Loesch has over ten years of experience practicing law, including five years of experience working for the Tribe. Before working for the Tribe, Mr. Loesch was a partner at the Seattle law firm Gordon and Polscer, where he specialized in complex, multi-party environmental insurance litigation and bad faith insurance litigation. He is admitted to the bar in Washington, the United States District Courts for the Western and Eastern Districts of Washington, the United States Court of Appeals for the Ninth Circuit, the United States Claims Court, and the Swinomish Tribal Court.

E) **Description of the Water Quality Program.**

Environmental Science. The Water Resources Program (Environmental Science Team) is committed to protecting the health and welfare of the Tribal Culture, the Community, and the natural environment by preserving, conserving, restoring, and enhancing the Reservation environment through the collection and analysis of high quality natural resource data and facilitating environmentally sound resource management, planning, policy development, and community outreach.

The Water Resources Program contributes to this mission by addressing the aspects of the natural environment related to water, including the quality and quantity of surface and subsurface waters within the Reservation boundaries as well as the implications for associated ecosystems. Most importantly, the WRP approaches these issues on a solid scientific basis (with well educated scientific personnel) while maintaining sensitivity to the Swinomish Culture.

The Environmental Science Team is responsible for: water quality monitoring of fresh, marine, wetland, and groundwaters; on-reservation salmon habitat restoration; environmental and ecological education; nearshore and beach habitat monitoring; toxics in shellfish and marine sediment monitoring; and water protection policy development.

F) **Description of the Technical and Administrative Capabilities of the Staff to Administer an Effective Water Quality Program.**

The tribe's capability to carry out water quality management can be satisfied by the existing staff of the Swinomish Office of Planning and Community Development (Planning Department). The Swinomish Water Resources Program is committed to water quality monitoring as part of the integrated, Reservation-wide environmental protection effort. Ongoing water quality monitoring also

facilitates environmentally sound resource management and planning.

The Water Resources Program is partially funded through the EPA Sections 106 & 319 and General Assistance Programs, and has been since September 1989. Tribal performance under these grants has been satisfactory to EPA. The Tribe and EPA have entered into an environmental agreement for the protection of Swinomish Indian Reservation natural resources. *See* Agreement Between EPA and Tribe, attached as Exhibit 29. The agreement's action plan prioritizes Tribal administration of the water quality standards program.

Reservation water resources are of critical importance to sustaining the continued use and occupancy of the Reservation, including the Tribes Treaty-guaranteed rights to fishing, hunting, and gathering. The Swinomish people depend on fish and shellfish resources and other species for subsistence, income, ceremonial, and cultural purposes. Quality of water resources seriously and substantially impacts the political integrity, economic security, health and welfare of the Tribe and its members. The Water Resources Program currently administers several programs as a comprehensive approach to preserving the quality of the Swinomish Indian Reservation water resources.

Ambient Water Quality Monitoring

The purposes of the Ambient Water Quality Monitoring (AWQM) program are: to establish baseline water quality data and characterize the waters of the Swinomish Indian Reservation; identify water bodies which fail to meet proposed water quality standard; and assess the effectiveness of existing regulations in protecting water resources.

Ambient water quality monitoring includes four basic components: ambient monitoring of conventional parameters (pH, temperature, dissolved oxygen, conductivity, salinity, chloride, turbidity, and fecal coliform bacteria); bio-assessments on perennial creeks; shoreline assessments and inventories in estuarine and marine waters; and toxic pollutant sampling in at-risk waters of the Reservation.

Groundwater

The Groundwater Characterization Project's objectives are to fully describe the groundwater hydrology of the Reservation, the interactions between groundwater and surface water, and to integrate this information into management tools, including a numerical model, monitoring plan, and resource protection policies and ordinances. This project is an ongoing study. The numerical models will be updated as new data is incorporated since the data acquisition will be continuous. Some of our data sources include: stream flow; precipitation; monitoring well water levels; domestic well water levels; and vegetation cover.

Tidelands and Nearshore

The tidelands surrounding the Swinomish Reservation are an important cultural, environmental, and subsistence resource for the Tribe. As part of the Water Resources Program commitment to water quality monitoring, comprehensive tideland resource monitoring is conducted including: testing shellfish (clams) for paralytic shellfish poisoning (PSP); surveying reservation beaches for clam population health and distribution; testing shellfish for bio-accumulate toxics; monitoring the nearshore environment for fish habitat and environmental health as part of the Nearshore Survey Project; and monitoring the effectiveness of *Spartina sp.* eradication techniques on reservation. As part of the Nearshore Survey Project, five new tidal benchmarks were installed for monitoring the nearshore environment.

GIS

The Swinomish Geographic Information Services (GIS) provides support to the Water Resources Program by global positioning system (GPS) locating and mapping environmentally significant features in the field and producing hard copy maps for planning purposes. The GIS employs a Trimble GPS unit and ArcView computer mapping software.

The Swinomish Geographic Information Services (GIS) and Water Resources Program worked on verifying vegetation points on the Reservation. NASA determined the vegetation points from the NASA spectral thematic mapper aerial data. This map will fill two critical holes in our data. First, this map will enable the completion of the eelgrass vegetation map that was started in 2000. The upland data will help us complete the refinement of our recharge rate to the Reservation aquifers.

Restoration Projects

As part of the water quality monitoring, the Water Resources Program observes areas that are degraded in both water quality and wildlife habitat. Many of these areas have been known to have water quality problems for some time. However, the opportunity to correct these problems takes time to plan and fund. One project has been completed with the installation of a TRD septic system at a residence within 20 feet of the shoreline. Recently, the Water Resources Program has secured funding for 3 water quality improvement projects.

The Fornsby Creek Restoration was funded by the Washington State Salmon Recovery Fund Board (SRF Board), the Natural Resources Conservation Service, and US Fish and Wildlife Tribal Landowners Incentive Program to install self-regulating tidegates, provide fish (salmon) access to restored rearing habitat, reintroduce saltwater into former estuarine wetlands, restore estuarine channels, and replant buffers.

The Lone Tree Creek Restoration Project, funded by the Natural Resources Conservation Service (NRCS), will remove blocking culverts (24" wide) and

replace them with a 40-foot bridge and larger arched culverts.

The Lone Tree Creek Water Quality Improvement Project was funded by the Environmental Protection Agency (EPA) Non-point Pollution fund (Clean Water Act Section 319). This project will study the Lone Tree Creek watershed to determine pollution sources and reduce the pollution by designing an in-channel treatment system in conjunction with channel restoration.

Environmental Education

The Water Resources Program aims to increase public awareness and knowledge about environmental issues and problems related to water quality. By providing education and community outreach, the Water Resources Program hopes to provide the skills and empower Tribal and community members to make informed personal choices and increase environmental stewardship.

Water Resources has implemented the Tox in a Box program, which focuses on the important issues of chemicals and environmental health, and how to apply it to everyday life individually and in the local community. This program caters to a wide range of applications and can be used to educate grades K-12.

In an effort to keep the Tribal Community informed on projects, volunteer opportunities, and other environmental issues, Water Resources offers community outreach by publishing articles in the monthly non-profit publication of the Swinomish Tribal Community, Kee-Yoks, and producing video segments for the Swinomish Cable Channel.

Staff

The Swinomish Water Resources Program staff is well equipped with knowledgeable, experienced personnel committed to environmental protection, restoration, and enhancement in order to protect human health and welfare and the environment. There are four full-time employees and four part-time employees to fulfill the goals and objectives of the Swinomish Water Resources Program, the Planning Department, and the Swinomish Indian Tribe.

Todd Mitchell, a Swinomish Tribal member, is the Water Resources Manager in the Swinomish Office of Planning and Development with the Swinomish Tribal Community. He graduated from Dartmouth College with a BS in Geology. He continued his studies at Washington State University and graduated with a MS in Geology specializing in hydrogeology, igneous petrology and geochemistry. Mr. Mitchell's research while employed by the Tribe has been focused on the Tribe's water resources including tidelands, surface water, groundwater, wetlands, and habitat restoration research.

Karen Mitchell is a hydrogeologist in the Swinomish Tribe's Planning Office. She graduated from University of Minnesota, Morris (BA, Geology) and from Washington State University (MS, Geology). Ms. Mitchell is currently pursuing a

PhD in Geology from the University of Washington. Her research at Swinomish has been focused on the Tribe's nearshore processes and groundwater resources including developing a numerical groundwater model.

Environmental Specialist, **Jamie Donatuto**, is the Project Manager of the Bio-accumulative Toxics in Native American Shellfish Project. Ms. Donatuto designs and performs environmental investigations related to pollution and health impacts, both for humans and the environment. She also coordinates the Environmental Education program. She has a degree from Western Washington University in Environmental Science with a minor in Chemistry and is currently pursuing a PhD from the University of British Columbia.

The Water Resources Program is also staffed with a Water Resource Specialist, **Rachel LovellFord**. She has worked for the program for over two years, focusing on surface and groundwater monitoring and data analysis, as well as nearshore and shellfish resources monitoring. Ms. LovellFord is responsible for field crew management and organization. LovellFord has a B.S. in Environmental Science with a focus on freshwater ecology and a minor in Environmental Education from Western Washington University.

Environmental Educator, **Kaia Smith** is responsible for carrying out the Tox in a Box program, an educational toolkit used to educate grades K-12. Smith has been trained by University of Washington, School of Public Health outreach coordinators. Additionally, Ms. Smith performs surface and groundwater water quality monitoring.

Martin Sampson, a tribal member, is the Water Quality Technician. He performs surface and groundwater water quality monitoring and tidelands, nearshore, and shellfish resource monitoring. Sampson has been trained by the Bureau of Indian Affairs as a certified Water Quality Technician and is certified in Hazardous Waste Operations and Emergency Response. Prior to his work with the Water Resources Program, Mr. Sampson worked under the Natural Resources crew of the Planning Department.

Corey Contreras is the Tribe's videographer and was hired under the Toxics in Shellfish Project that is managed by the Water Resources Program. He is currently working on maintaining the Swinoimsh cable station and producing video segments about the environment, shellfish, and water resources.

Sarah Akin is a Water Quality Technician Intern and is working on collecting and compiling water quality data, collecting and analyzing stream bioassessment survey data, and reviewing lab analytical techniques. Akin has a B.S. in Environmental Science from Western Washington University.

III. EXHIBITS

1. **Copies of Any Additional Documentation Required by the Regional Administrator.**
List of Attachments:

Exhibit 1, Previous Successful CWA TAS Applications
Exhibit 2, Federal Register Notice.
Exhibit 3, Swinomish Constitution.
Exhibit 4, 2005 Annual Report with Senate Roster.
Exhibit 5, The Treaty with the Duwamish, Suquamish, Etc., 1855, 12 Stat. 927.
Exhibit 6, Executive Order
Exhibit 7, Five Reservation Maps.
Exhibit 8, Fish Management Swinomish Tribal Community 2005 Report
Exhibit 9, Swinomish Fisheries Annual Report.
Exhibit 10, Ann E. Tweedy, "Using Plenary Power as a Sword: Tribal Civil Regulatory Jurisdiction under the Clean Water Act after *United States v. Lara*," 35 *Envtal L.* 171-190 (2005).
Exhibit 11, Philip A. Meyer, "Analysis of the Material Circumstances of 17 Washington Tribes (July, 1 1993).
Exhibit 12, "Northwest Tribal Values on the Land: A Study of Values that Northwest Tribes Associate with Streams, and with Associated Land Areas in Watersheds. A Report to the Northwest Indian Fisheries Commission, Olympia, WA."
Exhibit 13, Philip A. Meyer, "A Review of Two Documents from the Washington Department of Ecology" (March 15, 2005).
Exhibit 14, Letter from DSHS.
Exhibit 15, Lease Amendment No. 2 to Campground Lease.
Exhibit 16, Samples of Residential Leases.
Exhibit 17, More Samples of Residential Leases.
Exhibit 18, Excerpts of Lease Numbers 5020 and 5086.
Exhibit 19, Tribal Environmental Policy Act.
Exhibit 20, Shoreline and Sensitive Areas Ordinance.
Exhibit 21, Land Clearing Act.
Exhibit 22, Air Quality Act.
Exhibit 23, Memorandum of Understanding for Establishing Procedures for the Administration of a Cooperative Land Use Planning Program Between the Swinomish Tribal Community and Skagit County.
Exhibit 24, Swinomish Comprehensive Plan.
Exhibit 25, Agreement for Transfer of Water System and Release.
Exhibit 26, Indian Health Service Rating of Utility Authority.
Exhibit 27, Court Orders.
Exhibit 28, Cooperative Law Enforcement Agreement Between the Swinomish Indian Tribal Community and Skagit County.
Exhibit 29, Agreement Between EPA and Tribe.